84-183

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT WAYNE SMITH, D.D.S., Petitioner

v.

ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF OCCUPATIONAL LICENSING, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

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II. Unknown to Dr. Smith, the hearing officer had in his possession 250 pages of reports prepared by the State Troopers, representing the State's entire case against Dr. Smith. Considering that these reports were never introduced into evidence, nor in any way made part of the license revocation proceedings, was Dr. Smith deprived of his rights to due process and a fair hearing?

III. When a contested license revocation proceeding is heard by a hearing officer alone, does the Due Process Clause require the Dental Board to afford the licensed dentist an opportunity to review and present argument before the Board on the hearing officer's proposed decision recommending permanent revocation?

IV. Did the Alaska Supreme Court err in concluding that Dr. Smith's rights to due process and a fair hearing were not violated when, at two critical junctures in the license revocation proceeding, the Dental Board ruled against Dr. Smith as a direct result of ex parte contacts between the Board and the State's investigator and attorneys?

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The opinion of the Alaska Supreme Court entered May 2, 1984 is appended hereto as Appendix A. The opinion of the Superior Court for the State of Alaska, the intermediate appellate court, entered April 20, 1983, is appended hereto as Appendix B. The Order dated August 18, 1978 of the Alaska Board of Dental Examiners permanently revoking Dr. Smith's license to practice dentistry and oral surgery is appended hereto as Appendix C.

JURISDICTION

The Alaska Supreme Court entered judgment in this case on May 2, 1984. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

2. Alaska Statute 08.36.070 (amended 1980) provides in part:

> General Powers. The [Dental] board shall have, but not by way of limitation, the following powers and duties:
> . . .
> (5) to hold hearings, revoke, annul, or suspend the license of a person who violates this chapter or the rules and regulations of the board;
> . . . .

3. Alaska Statute 08.36.080 provides:

> Applicability of Administrative Procedures Act. The [Dental] board shall comply with the Administrative Procedure Act (AS 44.62).

4. Alaska Statute 08.36.100 (amended 1980) provides:

> License required. No person, except those specifically exempted from the application of this chapter, may practice, or attempt to practice,

dentistry without a license or permit, and a current certificate of registration.

5. Alaska Statute 08.36.250 (amended 1980) provides in part:

> Biennial registration. At least 60 days before January 1 of every other year, the division of occupational licensing shall mail a form for biennial registration to each licensed dentist. Each licensee shall complete the form and return it together with the registration fee. The division of occupational licensing shall, as soon as practicable, issue a registration certificate valid for the years for which issued. . . .

6. Alaska Statute 08.36.310 (effective prior to July 23, 1968) (amended 1968, repealed 1980) provides in part:

> Grounds for revocation of license. A license and registration may be revoked, suspended, or annulled, or the licensee may be reprimanded, censured, or disciplined by the board after hearing when he
> . . .
> (4) commits wilful and gross malpractice or wilful and gross neglect in the practice of dentistry;
> . . . .

7. Alaska Statute 44.62.500 provides in part:

Decision in a contested case. . . .
(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in a form which may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record with the lieutenant governor and a copy of the proposed decision shall be served by the agency on each party in the case and his attorney. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in (b) of this section upon the additional evidence and the transcript and other papers which are part of the record of the earlier hearing. A copy of the proposed decision shall be furnished to each party and his attorney as prescribed by (b) of this section. The agency may not decide a case provided for in this subsection without giving the parties the opportunity to present either oral or written argument before the agency.

If additional oral evidence is introduced before the agency, no agency member may vote unless he has heard the additional oral evidence.

8. Alaska Statute 44.62.540(a) provides:

> Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

STATEMENT OF THE CASE

Statement of Facts

When Dr. Smith pled no contest to two counts of misdemeanor assault and battery on June 18, 1968, the Anchorage Daily News, in bold 2½ inch headlines spread across the front page, proclaimed, "A Stunner - Dr. Smith's Trial Ends In A Legal Compromise." (June 19, 1968).

One of the most notorious and

expensive trials in the history of Alaska had come to an abrupt conclusion three weeks into the State's evidence. Dr. Smith, the state's only oral surgeon, was charged with one count of negligent homicide in connection with his administration of anesthesia. Judge Eben Lewis had severed a second count.

Pursuant to a plea agreement, the State dropped its indictment and filed a misdemeanor information, charging Dr. Smith with assault and battery.

Following his plea, Judge Lewis sentenced Dr. Smith to six months in prison, suspended on the condition that he not practice dentistry for a period of five years. Judge Lewis, however, noted that he was without authority to act on Dr. Smith's license - that disciplinary action was the prerogative of the Dental

Board. Judge Lewis then indicated that he would permit Dr. Smith to practice oral surgery during the five-year probationary period, with appropriate restrictions on his use of anesthesia, if the Dental Board approved. Tr. at 1507-10, 3660-66, 4828-34. R. at 173-83.

1. Dr. Smith's Practice: 1959 - 1968.

Dr. Smith's case, which so captured the public's imagination, was unlike any other. By all accounts, Dr. Smith was a brilliant oral surgeon. During his entire practice in the State of Alaska from 1959 to 1968, neither his patients nor his peers ever filed a single complaint of professional misconduct or malpractice on his part with either the Anchorage or Alaska Dental Societies, Tr. at 4142, 4216, or with the Alaska Board of Dental Examiners. Tr. at 3651.

He was an extremely competent oral surgeon, performing miraculous work. Dr. Joshua Wright, past Dental Board President, watched Dr. Smith operate, and was "fascinated by his hands." Tr. at 3695. See also Tr. at 3439-522 (Testimony of Dr. McKinley), 3643 (Dr. Wright), 4142 (Dr. Grubba), 4214-16 (Dr. Kaufman), 5660-715 (Dr. Layman), 5920-21 (Dr. Redmond), 6003-14 (Dr. Jaeger). The leaders of the dental profession referred their most difficult cases to Dr. Smith, sometimes personally observing him operate. He was a dentist's dentist, performing oral surgery on fellow dentists, their families, and their referrals. See id.

He brought great credit to his profession, not only through his superlative operative procedures, but

through his participation in civic affairs as well. He initiated the Alaska Dental Society's "Oral Cancer Day in the State of Alaska" program and was active in the American Cancer Society. Tr. at 4707-08.

The allegations against Dr. Smith all stemmed from his use of anesthesia. R. at 173-83; Tr. at 3401, 5021, 5922. Thus it was that Judge Lewis at the July 2, 1968 sentencing remarked:

> I wish there was some way that you could continue to function with - with your skills, but be deprived of the right to administer general anesthetic, . . . If you . . . could be of assistance to others and - in administering oral surgery, . . . with your great skills and if any way can be found to do it - I hope that way can be worked out. . . .
> . . . .
> [I]f there is any means whereby the licensing authority can find the means to employ his skills as a surgeon, I hope it can be done.

R. at 181, 183.

2. Five Years of Administrative Inaction: 1968 - 1973.

Immediately afterwards, on July 9, 1968, the State's Special Prosecutor on the case wrote a letter to the Dental Board requesting a license revocation hearing on behalf of the State. R. at 186-88. Dr. Smith, on July 14th, hand-delivered to the Board a written request for a hearing and investigation into any of the procedures he might have performed. R. at 66-68, Tr. at 1507.

On July 15th, in Dr. Smith's absence and without his knowledge, Judge Lewis met in chambers with the entire Dental Board. Tr. at 3655-56. Without notice, Judge Lewis ordered, ex parte, that the Alaska State Troopers make all their files pertaining to Dr. Smith available to the Board. Tr. at 4249.

The Board met with Investigator Hughes of the Troopers in Dr. Wright's basement for some three hours until midnight, July 15, 1968. Investigator Hughes turned over all his records to the Board, volumes of files and boxes, according to Board President Dr. Wright, and discussed his investigation, the indictment, and trial with the Board in detail, all in the absence of Dr. Smith. Tr. at 3656-58, 4248-52. Board minutes reflect, "Following the session with Mr. Hughes and after his departure, the Board unanimously voted to begin revocation proceedings against Dr. Smith." R., File No. 11, Exh. HHH.

On July 17th, the Board, in a letter to the District Attorney requested the Attorney General to "initiate proceedings leading to a hearing under the

Administrative Procedure Act in regard to the case of Robert W. Smith, D.D.S." R., File No. 11, Exh. ZZ. The District Attorney referred the letter to the Attorney General's Office on July 23rd. R., File No. 11, Exh. AAA.

Meanwhile, on July 24th, consistent with Judge Lewis' sentencing remarks, Dr. Smith again wrote the Board, requesting that the Board consider allowing him to practice with the U.S. Public Health Service, at Alaska Psychiatric Hospital, or in local hospitals. Tr. at 1508; R., File No. 9, Exh. E. In separate letters to Board President Dr. Wright, all four members of the Board recommended no action on Dr. Smith's request until a hearing on the status of his license had taken place. Tr. at 3665; R., File No. 11, Exhs. PPP - SSS.

Despite many requests by the Dental Board and by Dr. Smith, the State made no efforts to initiate proceedings in 1968.

Dr. Smith, on January 6, 1969, responding to an application form mailed to him by the Division of Occupational Licensing (DOL), sought to renew his license registration certificate. See Alaska Stat. § 08.36.250 (amended 1980). The State, in turn, petitioned to revoke his probation. Judge Lewis, in an order dated February 9, 1969, found Dr. Smith's application for renewal inconsistent with the terms of his probation. R., File No. 13, Exh. GGGGG. However, he did not revoke probation. Judge Lewis wrote,

> [D]efendant will not be considered to be in violation of his probation by making application to the Alaska Board of Dental Examiners for a limited permit to practice oral surgery only, in association with, and under the direct and immediate

> supervision of a licensed practitioner of medicine or dentistry.

Id.

Nothing further transpired until July of 1970 when Assistant Attorney General Robert Hartig spent an afternoon discussing the past three years of Dr. Smith's case with the Dental Board. Mr. Hartig assured the Board he would file an accusation seeking to revoke Dr. Smith's license. Tr. at 3539-43.

Mr. Hartig sent a memo to the Attorney General on July 22, 1970, explaining that Dr. Smith would be eligible for reissuance of his license in 1973 unless action was taken to revoke his license. The Attorney General responded on August 7th that license revocation proceedings should be initiated immediately. R., File No. 11,

Exh. WW.

Another year passed, and on July 29, 1971, the Dental Board sent one last letter to the Attorney General. The Board claimed:

> During these same intervening years, the Board has vigorously followed up on their requests with overt communication with the Attorney General's office and the Department of Commerce under whose jurisdiction it functions. To date, all these efforts to finalize this case have met with little, if any success.

R. at 216.

Dr. Wright testified in the license revocation proceedings that Dr. Smith repeatedly requested, both orally and in writing, a hearing before the Board, and that the Board, for several years, demanded that the Attorney General initiate proceedings. Tr. at 3652, 3661-64, 3668-70.

No hearing forthcoming, Dr. Smith served his five year probation in full compliance with the mandate of the court. He provided for his family by employment as a school bus driver, a high school science teacher, and a baker on the North Slope. Tr. at 1485-86.

3. The State Refuses to Recognize the Validity of Dr. Smith's License: 1973 - 1976.

In 1973, the court returned to Dr. Smith his license. R., File No. 13, Exh. DDDDD. Dr. Smith applied to renew his license registration certificate[1] on October 25, 1973. R., File No. 9, Exhs. J, I. DOL, however, refused to issue him a certificate, claiming that when he

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[1]Alaska Statute 08.36.100 (amended 1980) requires a dentist to possess either a license or permit to practice, together with a current license registration certificate, in order to practice.

surrendered his license to the court in 1968, he voluntarily abandoned any right to practice dentistry in Alaska. R., File No. 11, Exhs. DDD, XXXX, YYYY. The State's intransigence forced Dr. Smith to bring a mandamus action in Superior Court. Dr. Smith prevailed, securing on March 25, 1976, a judgment declaring his license valid and a writ of mandamus compelling DOL to issue him a current registration certificate. R., File No. 11, Exh. DDD.

4. Eight Years Later: The License Revocation Proceedings.

One month after DOL issued Dr. Smith a license registration certificate, on April 26, 1976, Assistant Attorney General James Reeves brought an accusation and petition to revoke Dr. Smith's license before the Dental Board on behalf of the Director of DOL. The

accusation alleged that Dr. Smith committed "willful or gross malpractice or willful or gross neglect" during the 1960 to 1967 year period. R. at 1-7. Dr. Smith filed an extensive notice of defense, R. at 8-13, and demanded a hearing before the full Dental Board, R. at 267, an option available to the Board under Alaska Statute § 44.62.500.

Acting ex parte, Mr. Reeves appeared before the Dental Board, and advised the Board regarding the accusation against Dr. Smith. As a result of this meeting, the Board requested the Governor to appoint a hearing officer to hear the case. R. at 20.

The bitterly contested 34-day license revocation hearing commenced May 4, 1977, and concluded January 11, 1978, after extensive interruptions. Over and over

again, the witnesses, testifying as to events that happened in the dentist's chair anywhere from nine to 17 years earlier responded, "I don't remember," "I can't recall," "It seems to me," "It must have been."

The hearing officer reached his decision August 15, 1978, recommending the permanent revocation of Dr. Smith's license. A copy was served on the office of Dr. Smith's counsel late that afternoon; however, he was out-of-state, and never actually received the decision until much later. DOL's attorneys were aware that Dr. Smith's counsel was away, and that he desired to be informed of the hearing officer's proposed decisions so that, if necessary, he could present objections and request oral argument before the Board. R. at 2020. DOL's

attorneys themselves had assured both Dr. Smith and the Superior Court that Dr. Smith would have the right to present his objections arguments to the Board. Tr. of Hearing on Motion for Temporary Stay at 8, 30, Case No. 77-2729 Civil (May 9, 1977).

5. Post-Hearing Procedural Irregularities.

On August 18, 1978, without notice to Dr. Smith, the Dental Board convened in a private club, and in a meeting in which the Director of DOL, Don Hostak, and DOL's Chief Investigator, Dick Long, were present, permanently revoked Dr. Smith's license. R. at 1721-23, 2013.

Upon receipt of the Dental Board's order, Dr. Smith's counsel prepared a petition for reconsideration and mailed it to the Dental Board. See Alaska Stat. § 44.62.540(a). The return receipt shows

that the petition arrived timely. See R. at 1216-51. Investigator Long intercepted and withheld the petition. When the 30-day period for ordering reconsideration lapsed, Long forwarded the petition to the Dental Board, with a cover letter urging the Board to deny the petition, timely filed, as untimely. R. at 2018. Long then convened and participated in the conference call in which the petition was found untimely. R. at 2016.

An appeal to the superior court was taken, and Investigator Long collected the administrative record from the hearing officer and shipped it to the Court Clerk's Office in Anchorage. When the boxes arrived in the Clerk's Office, they were secured with strapping tape. Upon slicing the tape and opening one of

the boxes, the Court Clerk and Dr. Smith's counsel discovered a manila envelope containing 250 pages of single-spaced typed reports prepared by Alaska State Troopers during the course of their investigation of Dr. Smith. R., File No. 10. These reports had never been admitted into evidence, nor in any way made part of the administrative proceedings. Yet Investigator Long's receipt for materials from the hearing officer shows that these documents came directly from the hearing officer. R. at 1992.

Statement of Proceedings

The federal questions sought to be reviewed by the United States Supreme Court were raised below as follows:

1. Unconstitutional Delay.

While Dr. Smith consistently raised

the question of whether the license revocation proceedings were barred by the Due Process Clause of the Fourteenth Amendment, both the hearing officer and the superior court, without explanation, failed to address this issue.

Dr. Smith initially raised the issue in his Notice of Defense, R. at 9, and in a motion to dismiss. R. at 169-70. He again raised the issue in his final argument before the hearing officer, R. at 479-85, and in his proposed findings of fact and conclusions of law. R. at 783.

With respect to the related issue of laches, the hearing officer found, "The results of a full and complete 1968 investigation of the alleged facts and circumstances presented in the current hearing have been in the possession of the Attorney General of Alaska since

July, 1968." App. C at 6. In an order dated August 15, 1978, the hearing officer wrote

> The eight year delay between the trial and the appointment of this hearing officer was the result of inexcusable neglect on the part of the State. This delay has in some ways prejudiced the respondent. The respondent has thrown away all of his records. Memories have faced. Certain witnesses have disappeared.

R. at 827. The hearing officer failed to address how the delay affected Dr. Smith's professional career, focusing solely on the prejudice to Dr. Smith in defending against three of the State's many allegations.

Dr. Smith raised the constitutional question relating to delay before the Dental Board in his Petition for Reconsideration. R. at 854. The Board, as explained below, never ruled on the

merits of the petition.

Dr. Smith raised the constitutional issue in his points on appeal to the superior court, R. at 864, and in his brief, R. at 1328, 1337. The court, without explanation, failed to address the constitutional question.

Dr. Smith again raised the constitutional issue in his points on appeal to the Alaska Supreme Court and in his brief and reply brief. The court wrote that "Dr. Smith had a due process right to be heard at a meaningful time before his license was permanently revoked." App. A at 4. But the court found that the eight-year delay did not deprive Dr. Smith of his right to a fair hearing because he "did in fact receive a hearing before his license was permanently revoked." App. A at 5. The court's

observation that "The 1968 license suspension occurred pursuant to a plea agreement which Dr. Smith approved," App. A at 4, is wholly erroneous as a matter of law and fact as no action whatsoever was taken on Dr. Smith's license until 1976.

2. Extra-Record Materials.

Dr. Smith's counsel first discovered that the hearing officer had possession of the Troopers' investigation reports in May, 1982. He was first able to bring it to the court's attention in his superior court brief. See R. at 1264. Without explanation, the superior court failed to address the issue.

Dr. Smith raised the issue in his points on appeal to the Alaska Supreme Court and in his brief and reply brief. The court inexplicably ruled, "Dr. Smith

has not rebutted the state's assertion that the evidence is in the record as a result of the consolidation of the [files of] various appeals [by the Appeals Clerk] and he has not shown that the board actually reviewed this evidence during the revocation proceeding."

App. A. at 14.

3. The Right to Present Argument On A Hearing Officer's Proposed Decision.

Dr. Smith demanded an opportunity to appear before the Dental Board prior to commencement of the hearing in his Demand for Hearing. R. at 267. He raised the denial of the opportunity to review and present argument on the proposed decision as the deprivation of due process in his petition for reconsideration, R. at 1216-51, which petition the Board failed to rule on as a result of ex parte contacts. Dr. Smith raised the question

in his points on appeal to the superior court, R. at 863, and in his brief, R. at 1327, 1334-36, 1894-97. The superior court concluded that the hearing met with the requirements of due process, noting that the Administrative Procedure Act, which allows the Board to delegate its responsibilities to a hearing officer, does not require a separate hearing before the Board. App. B at 36.

Dr. Smith raised the issue in his points on appeal to the Alaska Supreme Court and in his brief and reply brief. The supreme court held that Dr. Smith had

> "no due process right to be heard since Dr. Smith had an opportunity to rebut the evidence during the actual hearing."

App. A at 10. The court also wrote that Dr. Smith had no "constitutional right to

appear and speak before the Board". Id.

4. Ex Parte Contacts

Dr. Smith raised the matter of ex parte contacts between the State's attorney and the Board with respect to the accusation in his motion to dismiss, R. at 166-167, R. at 261-62. The hearing officer found no impropriety. R. at 240, 270.

Dr. Smith again raised the matter in his petition for reconsideration, which petition was not ruled upon when the DOL's Investigator withheld the timely petition until the 30-day period for reconsideration lapsed and then, in a letter of transmittal, advised the Board to deny the petition as untimely. R. at 2018. The Board did not rule on the petition, presumably finding it "untimely." The Board, by resolution,

approved minutes stating only that:

> DR. SMITH: A roll call was taken indicating that all board members had received Dr. Robert Wayne Smith's Petition for Reconsideration Rehearing and Trial de Novo, and in the Alternative, for a Stay of Enforcement of the Boards' (sic) Decision August 18, 1978, Pending Hearing on the Subject Petition; and if Denied, Pending Final Determination on Review and Appeal to the Superior Court.

R. at __.[2]

Investigator Long's role in the Board's handling of the Petition did not come to light until the Superior Court appeal had been filed. It was first raised in Dr. Smith's superior court reply brief; however, the superior court failed to address this matter.

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[2]DOL is in possession of the record; the record is not presently available to counsel to locate this page citation.

Dr. Smith again raised the issue in his points on appeal to the Supreme Court and in his brief and reply brief. The court found the State's handling of the petition "questionable," but held that "in view of the Board's subsequent denial of the petition we hold any error is in the nature of harmless error." It should be noted that the Board did not actually deny the petition, but simply refrained from ruling on whether to grant reconsideration.

With respect to the initial ex parte contact between DOL's attorney and the Board concerning the accusation, both the superior and supreme courts found the contact "entirely proper," reasoning that it was procedural only. App. A at 14, App. B at 38.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Principles Announced By The United States Supreme Court As To The Timely Initiation Of License Revocation Proceedings.

As the United States Supreme Court explained in Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

There is no question but that Dr. Smith had a property interest in his license sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment. See Barry v. Barchi, 443 U.S. 55, 69-70 (1979)(horse trainer's license). Indeed, "This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and

a calling, when chosen is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, (1873)(Bradley, J., dissenting).

Barry v. Barchi concerns the procedural safeguards required for suspension of a trainer's license upon the discovery of drugs in the postrace testing of a horse. After balancing the magnitude of a trainer's interest in avoiding suspension with the State's interest in preserving the integrity of the harness-racing sport and protecting the public, the Court found interim suspension without a presuspension hearing permissible.

The Court went on to discuss "how and when the adequacy of the grounds for

suspension is ultimately to be determined." 443 U.S. at 66. Noting the severe consequences of even a temporary suspension and the Armstrong requirement of a hearing "at a meaningful time and in a meaningful manner," the Court wrote:

> Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us. We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse-racing.

443 U.S. at 66. The Court found that because Barchi was not "assured a prompt post-suspension hearing, one that would proceed and be concluded without appreciable delay," his suspension was consti-

tutionally infirm. Id. The Court was concerned with the 30-day period of time. Id. at 61.

Justice Brennan, in a concurring opinion joined by Justices Stewart, Marshall, and Stevens, took into account the tremendous harm caused by even a temporary suspension -- irreparable damage to a trainer's livelihood and the loss of a clientele collected over the span of a career:

> A final full hearing and determination after Barchi had been barred from racing his horses and had lost his clients to other trainers was aptly described by the District Court as an "exercise in futility," 436 F.Supp. at 782, and would certainly not qualify as a "meaningful opportunity to be heard at a meaningful time." To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided -- i.e.,

> either before or immediately after suspension.

443 U.S. at 74.

While Barry v. Barchi involves the length of time between an interim order and a hearing on the final determination of a license, its reasoning is equally applicable here, where DOL's failure to institute proceedings following the court's order of probation amounted to a de facto summary suspension of Dr. Smith's license lasting a period of five years, followed not by a prompt post-suspension hearing in 1973, but another delay of three years. The difference between an eight year delay and a 30-day delay staggers the imagination. Over 10 years were to elapse before the hearing officer proposed that the Dental Board permanently revoke Dr. Smith's license on the basis of events allegedly occuring

anywhere from nine to 17 years earlier.

For eight years, Dr. Smith was forced to bear the consequences of DOL's inexcusable delay. These consequences, loss of a professional career, loss of clientele, humiliation, damage to reputation, and the waste of many years of education and training -- the very loss of liberty -- must be weighed against the State's interest in delay. That the State can advance no interest is all too painfully obvious. The delay deprived the community of the skills of an accomplished oral surgeon (Alaska's only civilian oral surgeon between 1959 and 1968) who, by all accounts performed "miracles" and by the State's own admission, was technically competent to treat "the teeth and the gums and the jawbones." Tr. at 3400. See Tr. at 3403-04.

Hearing Officer Holmes found over and over again that the State delayed too long in filing the accusation. R. at 827, Tr. at 4206, 5042-43, 5761. Judge Shortell stated, "From the record, I have no doubt that delay in bringing revocation proceedings against Dr. Smith was unreasonable and was the result of lack of diligence on the part of the state. It is clear that Dr. Smith's license was not revoked in 1968, but merely surrendered to the court during the period of his probation." App. B at 24.

The Alaska Supreme Court, however, erroneously concludes, "The 1968 license suspension occurred pursuant to a sentencing agreement which Dr. Smith himself approved." App. A at 4.

By the time of the hearing, Dr. Smith's records, hospital and physician

records, the Dental Society's records, and the District Attorney's records had all been lost. Tr. at 4156-57, 4225, 4240-41, 4267, 4593-95, 5103, 6130. Many witnesses had disappeared, including five of Dr. Smith's former employees, who could have testified as to his office procedures. Tr. at 4263, 4941-48, 5667-68.

Every witness (other than the expert witnesses testifying as to hypotheticals) suffered memory loss to some extent due to the nine to 17 year delay between the alleged acts and the hearing.

Dr. Smith was also prejudiced by the death of his trial attorney, Stanley J. McCutcheon. Mr. McCutcheon, who possessed all the facts and circumstances of the case, would have represented Dr. Smith before the Board. Tr. at 5065-66.

The State, on the other hand, was not as prejudiced by the delay. It employed Leroy Barker as its counsel in the administrative proceedings. Mr. Barker had participated in the 1968 trial. Additionally, Mr. Barker was assisted in the administrative hearing by Don Hughes, the same state investigator who assisted him in the investigation and preparation of the 1968 case.

A proceeding to revoke a professional license, based on incidents allegedly occurring nine to 17 years earlier, and fully known to the accusing agency as much as eight years earlier, does not constitute a meaningful opportunity to be heard at a meaningful time. The unconstitutional delay is further aggravated by the fact that Judge Lewis intended that Dr. Smith could practice

with a limited license during the five-year probationary period.

The opinion of the Alaska Supreme Court which does not take into account Dr. Smith's loss of livelihood, clientele, and reputation, holding only that the requirements of due process are met so long as a licensed dentist receives a hearing sometime before his license is revoked, is in conflict with this court's holdings in Armstrong and Barchi.

The constitutional balancing required by the Due Process Clause leads to only one conclusion: the license revocation proceeding must be declared void.

II. The United States Supreme Court Should Exercise Its Supervisory Powers To Review The Decision Of The Alaska Supreme Court With Respect To The Extra-Record Investigation Reports, Which Decision Is Wholly Without Any Basis In Fact And Which Operates To Deprive Dr. Smith Of His Due

Process Right To An Administrative Hearing In Which All The Evidence Is On The Record.

The uncontroverted administrative record shows that Dick Long, DOL's Chief Investigator, collected directly from Hearing Officer Holmes a "Manilla Envelope Closed, Marked 'Smith Hearing EXS Copies EX 1-20, EXA-JJ,'" together with the transcript of the hearing, exhibits, and pleadings. Long's inventory contains the notation, "Contents Sealed in 5 Boxes." R. at 1992. The boxes were sealed with strapping tape. Dr. Smith's counsel together with one of the Appeals Clerks, Madeline Pebsworth, cut the boxes open for the first time in May, 1982. They discovered the closed manila envelope, containing not exhibits, but confidential reports prepared by the Alaska State Troopers during the course of their

investigation of Dr. Smith's case in 1967 and 1968. File No. 10 of the record contains Mrs. Pebsworth's certificate that the manila envelope was found in a sealed box sent directly from the agency. Further, the clerk's certificate of the record on appeal from the superior to the supreme court, dated July 1, 1983, states on page three, "File No. 10 Contested Police Reports that Were Included in Envelope Containing Exhibit's 1-20 and Exhibits A - JJ. These were removed from the Record as Presented by Agency in Clerk's Office, Witnessed by Appeals Clerk." (emphasis added).

On appeal to the Alaska Supreme Court, counsel for DOL suggested in argument, without identifying any supporting evidence whatsoever, that the investigation reports were exhibits in a separate

cease and desist proceeding, and that the Appeals Clerk must have mixed the separate records of the two cases together.

The court, despite the fact that DOL did not produce one iota of evidence in support of its suggestion that the Appeals Clerk commingled the two case files, concluded,

> "Dr. Smith has not rebutted the state's assertion that the evidence is in the record as a result of the consolidation of the various appeals and he has not shown that the board actually reviewed this evidence during the revocation proceedings.

App. A at 13-14.

The court's finding is plainly and prejudically erroneous. The Alaska Supreme Court's aside that Dr. Smith has not shown that the Dental Board reviewed the reports is entirely specious, since

the Board needs not review the record once it delegates its authority to hear the case to a hearing officer. Not only did the hearing officer possess the reports, but he very well may have reviewed them, as is indicated by his written statement, "I have independently reviewed all of the facts and circumstances which make up the prior criminal conviction as well as additional facts and circumstances." R. at 829.

The Alaska Supreme Court's finding on this issue operates to deprive Dr. Smith of his right to a fair hearing. It is elementary that "it is a basis rule of fair play in administrative matters that all evidence be in the record." Maxwell v. Southside School District, 273 Ark. 89, 618 S.W.2d 148, 150 (1981). See also City of Fairbanks v. Alaska Public

Utilities Commission, 611 P.2d 493, 495 (Alaska 1980); Board of Dental Examiners v. King, 364 So.2d 319 (Ala.Civ.App. 1978).

Dr. Smith was denied notice that the hearing officer was to have access to the investigation reports, and was denied the right to challenge their admission and cross-examine their contents, much of which consists of multiple, extremely prejudicial hearsay.

In conclusion, the Alaska Supreme Court's reasoning and its decision on this issue are so seriously flawed that this court should exercise its supervisory powers to ensure that Dr. Smith's constitutional rights are not violated.

III. The Decision Below Conflicts With The Decisions Of The United States Supreme Court With Respect To The Right To Review And Present Argument On A Hearing Officer's Recommenda-

tions Before The Final Agency Decision-Maker.

The Alaska Supreme Court ruled that Dr. Smith had no constitutional right to review the hearing officer's proposed decision and present his objections and arguments relating thereto before the Dental Board. App. A at 10-11.

This holding is directly contrary to that of Morgan v. United States, 304 U.S.1, rehearing denied, 304 U.S. 23 (1938)(Morgan II) and Gonzales v. United States, 348 U.S. 407 (1955).

Morgan II states,

> "those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Id. at 18-19.

Morgan II outlines three constitu-

tionally adequate alternatives with respect to an agency's review of a hearing officer's findings. First, the hearing officer, after receiving the evidence, can prepare a report which serves as the basis for objections and argument. Second, the agency itself can hear the evidence and arguments of the parties and make a decision upon conclusion of the argument. Third, after hearing evidence, the agency can receive proposed findings, hear arguments thereon, and make a decision. Id. at 21-22.

Thus, Morgan II recognizes that where an agency itself does not hear the evidence, it should allow objection to and argument on the hearing officer's proposed decision prior to the issuance of a final order.

Similarly, Gonzales required that a

registrant for conscientious objector status be afforded the opportunity to reply to the Justice Department's recommendations on his status before the recommendations were taken up by the Appeal Board. See also Robinson v. Kentucky Health Facilities, 600 S.W.2d 491 (Ky. App. 1980), holding that due process rights of a foster care licenseholder were violated where the licenseholder was denied an opportunity to review and file exceptions before the Licensure Board on the recommendations and finding of fact entered by the hearing officer.

Under Alaska's Administrative Procedure Act, Alaska Stat. §§ 44.62-.010 - .650, in a contested case, a copy of the proposed decision must be served on each party and his attorney. Id.

§ 44.62.500(b).

A proposed decision does not become final automatically with the passage of time. Rather the Dental Board must take action. After the hearing officer submits a proposed decision, the agency may 1) adopt the proposed decision in its entirety, 2) adopt the proposed decision, but reduce the penalty; 3) decide the case on the record, with or without taking additional evidence; or 4) refer the case back to the same or another hearing officer to take additional evidence. Id. § 44.62.500(b), (c).

Thus, under Morgan II, Dr. Smith was entitled "to be fairly apprised" of the hearing officer's proposed decision of permanent revocation and to be heard on the proposed decision before its adoption. Dr. Smith could have presented

his objections and, pursuant to the Administrative Procedure Act, requested the Board to reduce the penalty, decide the case itself, or refer the case to a hearing officer.

An opportunity to review the proposed decision was imperative here for four reasons.

First, the State itself, during related injunctive proceedings, assured both Dr. Smith and the Superior Court that Dr. Smith had the right to submit argument to the Board. Lead counsel, Leroy Barker, stated, "The hearing officer decides all of the matters, . . . then if the respondent is dissatisfied with the hearing officer's findings, the fact [sic] conclusions of law, he has an appeal to the board of dental examiners." Transcript of the Hearing on Motion for

Temporary Stay at 8, Case No. 77-2729 Civil (May 9, 1977). Further, "The hearing officer has a right to make the various evidentiary determinations, privilege determinations, and when he gets all through, if the entire proceedings was [sic] not -- and the result is not to the respondent's liking, he has an appeal to the Dental Board. . . ." Id. at 30.

The State advanced these arguments to encourage Dr. Smith to reserve his objections to the hearing officer's rulings until the objections could be brought to the attention of the Dental Board itself. Id. at 8, 30. Having instigated this procedure, it violates the spirit of fair play to withhold that right from Dr. Smith.

Second, under Goldberg v. Kelly, 397

U.S. 254 (1970), as a matter of due process, the hearing officer was required to indicate the evidence he relied upon in making his findings. Had Dr. Smith been afforded the opportunity to present argument, he could have apprised the Board that the hearing officer failed to indicate the evidence he relied upon. For example, the State alleged in its accusation that Dr. Smith had committed various acts of malpractice on 36 named patients. The State produced evidence with respect to only 13 patients. The hearing officer found, "The State submitted evidence on only a portion of the [36] patients named but sustained its burden as to a substantial number of those [36] patients. . . ." App. C at 15. He did not identify which patients, nor the acts of malpractice allegedly committed. The

confusion generated by this finding is aptly demonstrated by the superior court's conclusion that Dr. Smith malpracticed on all 36 named patients.

See also, Consumers Water, Inc. v. Public Utility Commission, 651 S.W.2d 335 (Tex. Ct. App. 1983), in which the court wrote:

> The point of the requirement for service of the proposal for decision prior to final decision of the agency is to afford an opportunity to the parties to point out any portions of the testimony which may have been overlooked, misunderstood, or improperly appraised. The parties are thereby given a valuable opportunity not only to argue to the officers who will make the final decision what findings of fact the record compels, but also to argue all applicable principles of law.

Id. (citation omitted).

Third, while Dr. Smith had no notice of the August 18, 1978 Board meeting in which his license was revoked, DOL

Director Don Hostak and DOL Investigator Long had notice and were present. Board minutes reveal that Long advised the Board on administrative procedures regarding a proposed decision recommending the revocation of another dentist's license and that Long telephoned an assistant attorney general and relayed the attorney's opinion to the Board. Fortunately, that dentist was present and was able to respond to Board member's questions and persuade the Board to allow him an opportunity to present additional written argument. R. at 1721-23.

Finally, in a license revocation proceeding, where valuable liberty and property interests are at stake, it is basically fair and just to allow an oral surgeon to make a statement to the Dental Board, a body comprised of his peers and

lay persons interested in the dental profession. During his career, Dr. Smith was considered a very gifted and dedicated oral surgeon. It is only fair that the Dental Board that had the power to revoke or limit his license should have afforded him the opportunity to speak on his own behalf. See, e.g., Hodge v. Department of Professional Regulation, 432 So.2d 117, 119 (Fla. Dist. Ct. App. 1983), stating that

> A convicted criminal has long been allowed to speak on his own behalf, in mitigation and denial, before sentence is imposed. Although this is not a criminal procedure, the loss of a professional license is a sufficiently serious loss to an individual to justify affording him similar consideration and fair treatment.

In conclusion, under the circumstances of this case, the holding of the Alaska Supreme Court that Dr. Smith had

no right to appear before the Dental Board constitutes a significant departure from Morgan II which recognizes that "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure. . . ." 304 U.S. at 20.

IV. The Supreme Court Should Exercise Its Supervisory Powers To Review The Decision Of The Alaska Supreme Court With Respect To Whether Dr. Smith Was Denied Due Process By Virtue Of Ex Parte Contacts With The Dental Board.

Two of the State's ex parte communications with the Dental Board with respect to Dr. Smith's case are particularly egregious. First, DOL's attorney, Mr. Reeves, who signed the accusation against Dr. Smith, subsequently appeared before the Board, and without any notice to Dr. Smith, nor the

opportunity to respond, persuaded the Board to delegate its authority to hear the case to a hearing officer sitting alone. This contact was critical: The State, to this day, from 1968 to 1984, has never permitted Dr. Smith to appear in person before the Dental Board itself.

The gravity of this contact is further compounded by the fact that the Attorney General's Office selected the hearing officer, and in the hearing officer's own words, promised him that "the Attorney General would consider it a favor," R. at 1756, if he would agree to the appointment. Shortly thereafter, the hearing officer obtained substantial employment as legal counsel for MICA, the State's medical malpractice insurance agency. R. at 1901, 1921, 1927, 1957-60.

Second, on September 9, 1978, well within the 30 days allotted by Alaska Statute § 44.62.540(a), Dr. Smith petitioned the Board for reconsideration of its August 18th decision. R. at 1216-51. On October 2nd, one of DOL's attorneys, Assistant Attorney General Bruce Botelho, prepared a memorandum in opposition to Dr. Smith's petition. R. at 2019-22. On October 16th, DOL Chief Investigator Long forwarded a copy of the petition to the Board. Long's letter of transmittal reads as follows:

> All Members
> Alaska Board of Dental Examiners
>
> Dear Member:
>
> ....
>
> Enclosed is a copy of the Petition for Reconsideration, Rehearing and Trial De Novo, or in the alternative, for a Stay of Enforcement, from Robert W. Smith.

Also enclosed is your counsel's Memorandum In Opposition to Respondent's Petition for Reconsideration.

According to counsel, it appears that the power to order reconsideration (AS 44.62.540) lapsed on September 17, 1978, even though the board at that time was probably unaware that respondent's petition had been submitted. On that basis alone, counsel advises that your board should probably deny respondent's petition for reconsideration.

Your board should consider this matter at the earliest possible date rather than wait until your next board meeting. In this regard, this office will be attempting to arrange a conference call or other means for the board to rule on this issue. On consideration, you will be required to enter an order as to your findings. On receipt of the original signed order, this office will expedite service to all parties.

Sincerely,

Richard L. Long
Chief Investigator

This letter 1) was not served upon

Dr. Smith; 2) transmits Dr. Smith's timely petition to the Board one month after the deadline for the petition; 3) states that Mr. Botelho, the attorney for Dr. Smith's adversary, DOL, is also the Board's attorney; 4) states that the Board's attorney advises the Board to deny Dr. Smith's petition on the grounds that the Board's authority to reconsider its August 18th order lapsed September 17th, eight days after Dr. Smith submitted his timely petition and 29 days before DOL bothered to transmit the petition to the Board; 5) implied that the Board's counsel had opposed the petition on the grounds that the Board lacked authority to take any action on the petition when, in fact, Mr. Botelho raises no such argument in his memorandum of opposition; and 6) urges the Board to con-

sider Dr. Smith's petition, Mr. Botelho's opposition, and Investigator Long's letter without further hearing or notice to Dr. Smith. R. at 2018.

The Board denied Dr. Smith's petition as untimely in a conference call meeting on October 25th. Investigator Long participated in the call. R. at 2016. Two weeks later, the Board amended its order to provide only that the board had received the petition -- presumably meaning that since the petition was "untimely," the Board's power to entertain the petition had lapsed. R. at ___.

The Alaska Supreme Court's conclusion that any error in the State's handling of the petition is harmless error because the Board "denied" the petition is wholly untenable as a matter of law and fact because the Board <u>never</u> ruled on the

merits of the petition.

The law is clear: When a man's livelihood and reputation are placed in jeopardy, "he is entitled to a completely impartial tribunal whose decision must be arrived at without ex parte consultation with his adversary." City of Anderson v. State ex. rel. Page, 397 N.E.2d 615, 620 (Ind. Ct.App. 1979). Ex parte communications during critical decisional points not only create an appearance of impropriety, but seriously impair the fairness and impartiality of the quasi-judicial Dental Board. See In re Robson, 575 P.2d 771, 774-75 (Alaska 1978).

These two ex parte contacts, one at the beginning and the other at the end of the license revocation proceedings insured that Dr. Smith would never have the opportunity to go before the Board,

before his peers, to speak on his own behalf and in his own defense.

This court should reject the Alaska Supreme Court's holding that the first contact was entirely proper and that the last, while "arguably unreasonable" was "harmless error." These contacts were substantial violations of Dr. Smith's right to a fair hearing.

CONCLUSION

This court wrote in Board of Regents v. Roth, 408 U.S. 564 (1972), that "it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." Dr. Smith asks only that he be afforded procedural fairness.

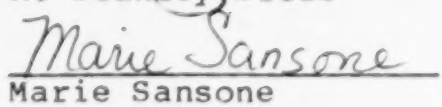
The decision of the Alaska Supreme Court departs substantially from basic

constitutional principles adhered to by this court with respect to the timely initiation of license revocation proceedings and the opportunity to present argument to the final agency decision-maker. Further, the court wholly ignores the record in this case to arrive at conclusions without any factual support, with the result that Dr. Smith has been deprived of the most basic constitutional protections against the use of extra-record information and ex parte contacts.

Based on the foregoing, Dr. Smith asks that this court issue a writ of certiorari to review the judgment entered in this case by the Alaska Supreme Court.

Respectfully Submitted,

R. Stanley Ditus



Marie Sansone

Counsel for Petitioner

IN THE SUPREME COURT
OF THE STATE OF ALASKA

ROBERT WAYNE SMITH, D.D.S., Appellant,	)	File No. 7806
v.	)	MEMORANDUM OPINION AND JUDGMENT*
STATE OF ALASKA, BOARD OF DENTAL EXAMINERS, Appellee.	)	No. 163 - May 2, 1984

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian C. Shortell, Judge.

Appearances: R. Stanley Ditus, Marie Sansone, Anchorage, for Appellant. Bruce M. Botelho, Special Assistant Attorney General, Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Matthews and Compton, Justices. [Burke, Chief Justice, and Moore, Justice, not participating]

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* Entered pursuant to Appellate Rule 214.

This is an appeal from a superior court's affirmance of the Board of Dental Examiners' revocation of a license to practice dentistry. On August 18, 1978, the Board revoked the license of Dr. Smith due to his wilful and gross malpractice or negligence during the course of his dentistry career. Dr. Smith has raised numerous allegations of error relating to the state's conduct before, during and after the revocation hearing. We find that the evidence in support of the Board's action is substantial and therefore requires an affirmance in this case.

I. STATUTE OF LIMITATIONS

The courts are virtually unanimous in holding that civil and criminal statutes of limitations are not applicable to license revocation proceedings. Hartman

v. Board of Chiropractic Examiners, 66 P.2d 705 (Cal. App. 1937); Unnamed Physician v. Commission on Medical Discipline, 400 A.2d 396 (Md. App. 1979). We conclude that the proceeding to revoke Dr. Smith's license was not barred by AS 09.10.20, AS 09.01.070(2) or AS 12.10.010.

II. LACHES

Even if the doctrine of laches applies to license revocation proceedings, it will bar this proceeding only if the state's delay unduly prejudiced Dr. Smith. Moore v. State, 553 P.2d 8 (Alaska 1976). The delay did prejudice Dr. Smith, but we conclude that the hearing officer properly took account of the prejudice and discounted those allegations which were prejudicially affected by the delay. Furthermore, there were enough clearly remembered

instances of negligence and malpractice to sustain the hearing officer's findings.

III. ESTOPPEL

Dr. Smith abandoned any estoppel argument by failing to raise this issue before the superior court.

IV. DUE PROCESS AND RIGHT TO BE HEARD AT A MEANINGFUL TIME

Dr. Smith had a due process right to be heard at a meaningful time before his license was permanently revoked. Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed.2d 62, 66 (1965). That right was not violated. The 1968 license suspension occurred pursuant to a sentencing agreement which Dr. Smith himself approved. Although the state's delay in acting on Dr. Smith's license after 1973

was arguably unreasonable, that delay did not forever foreclose the possibility of holding a constitutionally sufficient hearing. Dr. Smith did in fact receive a hearing before his license was permanently revoked. Our review of the record persuades us that Dr. Smith was accorded a hearing which comported with due process requirements. The delay therefore did not deprive Dr. Smith of his right to a fair hearing.

V. THE ACCUSATION

The accusation filed by the state inaccurately represented the applicable standard to apply against Dr. Smith. Since the hearing officer recognized this and specifically stated that he would apply the proper statutory standard set forth in AS 08.36.310(4) (amended 1968, repealed 1980) we find that the error was

harmless.

There is also no merit to Dr. Smith's claim that the accusation did not set forth the precise acts or omissions with which he was charged. The accusation was sufficiently precise and the pre-hearing brief specifically notified Dr. Smith of the incidents the state intended to prove.

VI. NOTICE OF THE HEARING

Although Dr. Smith was not notified of the hearing in the precise manner provided for by AS 44.62.420, this technical defect is irrelevant since he was given timely notice in an alternative manner.

VII. OATH OF THE HEARING OFFICER

Hearing Officer Holmes did not take an oath of office for his position as a public officer. The case law provides,

however, that acts of de facto officers are valid as to the public and third parties. See 67 C.J.S. Officers § 276 at 812 (1978). Dr. Smith is not in a position to challenge Hearing Officer Holmes' acts on this ground.

VIII. BIAS OF THE HEARING OFFICER

Dr. Smith has not proven bias on the part of the hearing officer. Hearing Officer Holmes' position with the Medical Indemnity Corporation of Alaska is insufficient, in and of itself, for a showing of bias. The rulings made by Mr. Holmes during the hearing also do not evidence hostility toward Dr. Smith. The Hearing officer properly exercised the powers of his office in ruling on certain matters in an alternative fashion. This by no means demonstrated bias against Dr. Smith.

IX. ORDER TO COMPEL DR. SMITH TO TESTIFY

Dr. Smith waived hs right to assert the protection of AS 44.62.240(c) when he failed to timely object to the inclusion of his name on the state's witness list. The witness list is designed to avoid surprise and delay and Dr. Smith should have raised his objections prior to the commencement of the hearing.[1]

X. ADMISSION OF HEARSAY TESTIMONY

The testimony of Drs. Kelley, Maxwell and Whaley was properly admitted under the former testimony exception to the

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[1]Dr. Smith relies on AS 44.62.240(c) and does not challenge the order to compel his testimony directly on his constitutional privilege against self-incrimination. That issue was not adequately raised and will not be dealt with here.

hearsay rule. Dr. Smith had a reasonable opportunity to cross-examine them in 1968 and the issues, as to the testimony in question, were substantially similar in both proceedings. The unavailability requirement is met since two of the doctors are dead and one is in Oregon. Civil Rule 32(a)(3) allows for the use of a deposition if the witness is more than 100 miles from the hearing. Since former testimony is made under oath and subject to cross examination it is roughly equivalent to a deposition. See C. McCormick, Law of Evidence § 253, at 609 n.30 (2d ed. 1972). There was no error in admitting this testimony.

XI. SERVICE OF PROPOSED DECISION

The Board adopted the hearing officer's proposed decision in full pursuant to AS 44.62.500(b). Dr. Smith was

not served with a copy of the proposed decision as required by that statute. We find this to be harmless error.

We note that Dr. Smith had no statutory or constitutional right to appear and speak before the Board. AS 44.62.500(b) renders this case dissimilar to those cases requiring service of proposed decisions because a statute or regulation specifically affords a party an opportunity to respond to the decision. See Alaska Transportation Commission v. Gandia, 602 P.2d 402 (Alaska 1979); Consumers Water, Inc. v. Public Utilities Commission of Texas, 651 S.W.2d 335 (Tex. App. 1983). There is also no due process right to be heard since Dr. Smith had an opportunity to rebut the evidence during the actual hearing. Alaska Transportation, 602 P.2d at 406;

Leeds v. Gray, 242 P.2d 48, 54 (Cal. App. 1952). We hold that, since Dr. Smith did not have a statutory or constitutional right to appear and speak before the Board the failure to serve him with a copy of the proposed decision was harmless error.

XII. SUBSTANTIAL EVIDENCE

The decision was supported by overwhelming evidence and neither the hearing officer nor the Board acted arbitrarily or capriciously.

XIII. DISCIPLINARY ACT OF REVOCATION

The Board's revocation of Dr. Smith's license was a proper disciplinary act based upon substantial evidence of a general lack of judgment in his practice.

XIV. SIGNATURES OF THE BOARD MEMBERS

The Board's order of revocation was

signed only by the Board president. AS 08.36.320 (amended 1980) requires "a majority vote, evidenced by the signatures of the members on the order . . . ." Since the minutes of the Board meeting show that the proposed decision was adopted unanimously, we hold that the failure of each member to sign the decision does not invalidate it. The statute states that signatures are evidentiary of a majority vote. Where there is sufficient other evidence of a majority vote the failure to obtain the signatures is harmless error.

XV. THE RECORD

Dr. Smith raised three issues with regard to the record. First, a volume of the transcript has a number of handwritten marks throughout its text. There is no evidence that the state is responsible

for the marks or that the marks prejudiced the Board or the reviewing court, and we therefore find no error. Second, we find that the few omissions from the record do not require reversal of the Board's decision. Dr. Smith has not shown that the omitted testimony was material and the evidence in the record is sufficient to support the Board's decision. We disapproved of a court going off the record in In re P.N., 533 P.2d 13, 19 n.13 (Alaska 1975), stating that such action "makes it difficult, and sometimes impossible . . ." for an appellate court to review a case. However, the evidence was so substantial here as to make the omissions harmless. Finally, the state has adequately explained the presence of the evidence in the manila envelope. Dr. Smith has not

rebutted the state's assertion that the evidence is in the record as a result of the consolidation of the various appeals and he has not shown that the board actually reviewed this evidence during the revocation proceedings.

XVI. EX PARTE CONTACTS

Dr. Smith alleges that the Board had improper ex parte communications with the state on four separate occasions. There is no merit to his claims as to the first three instances. James Reeves' meeting with the Board was entirely proper. Under In re Cornelius, 520 P.2d 76 (Alaska 1974), he could advise the Board on procedural matters. Sharon Andrew's contact with the Board was in connection with the cease and desist order and, as such, authorized by AS 08.01.087(b)(1). Richard Long's presence at the Board

meeting did not violate the rule set forth in Matter of Robson, 575 P.2d 771 (Alaska 1978), in which this court stated that counsel for either party should not be present at the deliberations of the Board. The minutes of the August 18, 1978 Board meeting clearly state that the Board went into a closed executive meeting to discuss the hearing officer's proposed decision. Although Mr. Long and Don Hostak were present at the open meeting there is no evidence that they were present during the Board's deliberations on the case.

Finally, we recognize that the state's handling of the petition for reconsideration was questionable, but in view of the Board's subsequent denial of the petition we hold that any error is in the nature of harmless error. There is

no evidence that the Board's denial was influenced by DOL Investigator Long's letter.

XVII. ATTORNEY'S FEES

This case is essentially of private interest to Dr. Smith. Though the public may have an interest in suits raising allegations of improper state conduct, there is no merit to his claim for attorney's fees as a public interest litigant. See Storrs v. State Medical Board, 664 P.2d 547, 550 (Alaska 1983), cert. denied, ___ U.S. ___, 78 L. Ed.2d 312 (1983).

The Judgment is AFFIRMED.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ROBERT WAYNE SMITH, D.D.S.

Plaintiff

vs.

SHARON ANDREW, et al.,

Defendants.

Case No. 3AN-76-1019 Civil

OPINION

I. FACTS

This is an appeal from a decision of the State Board of Dental Examiners which revoked the license of Robert Wayne Smith, D.D.S. For the reasons stated in this opinion, the decision is affirmed.

On April 26, 1976, an administrative action was brought to revoke Dr. Smith's

license. The accusation charged Smith with violating Alaska Statutes 08.36.310(4)[1] committing wilfull and gross malpractice or wilfull and gross neglect in the practice of dentistry. The action focused on Dr. Smith's improper administration of anthestics (sic) from 1960-1967.

Prior to the administrative action, Dr. Smith had been charged with the manslaughter of two patients. In June 1968, Dr. Smith pled nolo contendere to assault and battery (AS 11.15.230); he received a six-month suspended sentence and was put on probation, with the condition that he refrain from practicing dentistry for five years. Although the

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[1]AS 08.36.310 was repealed in 1980 and was replaced by AS 08.36.315

sentencing judge noted that the dental board should decide whether or not Dr. Smith's license should be revoked, such a proceeding was not initiated until five years later.

In 1973, at the end of his probationary term, Smith's license was returned to him. However, the Division of Occupational Licensing refused to recognize the validity of the license, contending that it had been permanently revoked. Smith brought an action in superior court in March 1976, which resulted in a finding that Smith's rights under the license were still valid because they had not been properly revoked, suspended or annulled.

On April 26, 1976, the administrative action which has led to this appeal was initiated. A hearing officer was

appointed to conduct administrative hearings. At the conclusion of the hearings, the hearing officer recommended the revocation of Smith's license and the Board of Dental Examiners adopted this decision.

The Hearing Officer's Decision.

The hearing officer's decision was issued on August 15, 1978. Hearing officer (sic) Holmes decided on evidence which related solely to Smith's practice and utilization of general anesthesia from 1960-1968. No evidence of incidents subsequent to July 2, 1968 was presented.

The hearing officer noted that current law prohibited dentists, including oral surgeons, from administering general anesthesia without a special permit to do so. Smith does not

possess such a permit. The hearing officer disregarded the conviction for assault and battery as a crime against moral turpitude and as a ground for revocation of license. He only considered whether Smith had engaged in gross and wilfull malpractice.

Hearing Officer Holmes found the state had met its burden in showing that Smith committed wilful and gross malpractice with regard to five patients who subsequently died after administration of general anesthesia and 36 others who were improperly administered general anesthesia. The hearing officer specifically found that Smith had failed to:

1. Advise patients not to eat before administration of general anesthesia;

2. Advise patients to be accompanied home after surgery;

3. Obtain proper consent;

4. Explain risk to patients;

5. Follow proper procedure and kept patients under general anesthesia for a longer period than customary;

6. Follow proper procedure and left patients unattended during and after surgical procedures;

7. Constantly monitor vital signs during periods patients were under general anesthesia.

8. Maintain adequate emergency drugs and equipment;

9. Utilize properly-trained personnel;

10. Utilize general anestheia (sic) only with sufficient justification;

11. Administer proper emergency treatment when patients developed difficulties with general anesthesia;

12. Administer proper amounts of general anesthesia.

The hearing officer also held that the state sustained its burden in showing that despite the similarities in the deaths of the individuals, Smith sought

no advice or consultation from his professional peers. He also found Smith had failed or neglected to maintain the minimum standard of continuing professional education. Finally, Smith was found to have exhibited a gross lack of comprehension of professional obligations borne by a person licensed to practice dentistry.

Reasoning that Smith's actions exhibited a willful, conscious choice of action with knowledge of serious danger and acting in such a way that any reasonable person would have realized the high probability of injury, the hearing officer then concluded that this lack of judgment persisted. Because of Smith's potential to inflict grevious bodily harm, the hearing officer recommended that Smith's license be revoked

permanently.

SCOPE OF REVIEW -- LAW

There are two standards applicable for review of administrative actions. Where an agency decision deals with administrative expertise as to either complex subject matter or fundamental policy formulation, deference should be given to an administrative determination if it has a reasonable basis in law and in fact. Alaska Public Utilities Commission v. Chugach Electric Assn., Inc., 580 P.2d 687, 694 (Alaska 1978).

On the other hand, there are cases of statutory interpretation which present:

> Questions of law in which knowledge and experience in the industry affords little guidance toward a proper consideration of the legal issues. These cases usually concern statutory interpretation or other analysis of legal relationships about which courts have specialized

> knowledge and experience. Consequently, courts are at at (sic) least as capable of deciding this kind of question as an administrative agency.

Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971).

In this case, the legal issues raised by Dr. Smith do not involve specialized administrative expertise. The questions are questions of law involving general statutory interpretation, which a court is capable of deciding without undue deference to the administrative agency.

SCOPE OF REVIEW--FACTS

The parties in this case agree that the correct standard of review on the facts is the "substantial evidence test." There is no doubt that this is the correct standard to apply to proceedings before the dental board. See, Storrs v. State Medical Board and Alaska State

Division of Occupational Licensing, JAN-81-1459 for a full discussion.

JURISDICTION

The initial determination is whether the Board of Dental Examiners had jurisdiction to decide the case. The analysis of this issue will be done in two parts. First there are the technical problems, including whether the proceeding was properly convened; whether it was necessary for the hearing officer to take an oath; whether the Board gave adequate notice of the hearing; and whether an order of the Board is valid without the signatures of a majority of its members. Second, there is a question of whether the statute of limitations or the doctrine of laches barred the proceedings

before the Board.

INITIATION OF PROCEEDING

Smith contends that Andrew, the Director of the Division of Occupational Licensing, did not have the capacity to initiate the proceeding, and that the unverified accusation filed against Smith was improper. AS 44.62.330-AS 44.62.630, governs administrative adjudications such as those before the dental board.

AS 44.62.360 provides:

> Accusation. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation shall (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare his defense; (2) specify the statute and rule which the respondent is alleged to have violated, but may not consist merely of charges phrased in the

> language of the statute and the rule; and (3) be verified unless made by a public officer acting in his official capacity or by an employee of an agency on whose behalf the proceeding is to be held; the verification may be on information and belief.

The accusation was filed by Sharon Andrew, acting in her official capacity and on behalf of the Occupational Licensing Agency. See, AS 08.01.050(19), AS 08.01.087. In addition, the accusation was signed by two assistant attorneys general acting in their official capacity. Thus, according to the statute, the accusation need not be verified.

COMPOSITION OF THE BOARD OF DENTAL EXAMINERS.

The next question is whether the positions on the Board of Dental Examiners were occupied at the time the resolution was passed initiating this

action.

On June 28, 1976, a resolution was passed by the Board requesting the Governor of Alaska to appoint a qualified hearing officer for this case. On May 29, 1976, AS 08.36.010, which provided for the creation and membership of the Board of Dental Examiners, was amended. Prior to the amendment, the statute provided that the Board be composed of five members. The amendment changed the composition of the Dental Board to seven members. Dr. Smith argues that when the new board was created, the old board ceased to exist on the date of the amendment. Thus, the Board did not have any authority to pass the June 20, 1976 resolution. The State contends that the Board was not abolished by the 1976 amendment, and the only change was to

increase its membership. I find the State's interpretation appropriate, as the amended statute does not expressly abolish the old dental board.

Smith next contends that no quorum was present at the June 28, 1976 meeting when the resolution was passed. He argues that even if the old board was carried over, the amended statute creates two new positions which remained vacant as of June 28, 1976. A quorum of a majority of the Board of seven therefore would be at least four members. Smith then argues that because two members of the dental board had resigned, there were only three remaining persons on the Board.

The minutes of the meeting of June 24 and June 28, 1976 clearly show a quorum of five was present and the two resigning

members did not do so until after the June 1976 meeting. (R. 18)

OATH OF THE HEARING OFFICER

Dr. Smith contends that hearing officer Holmes did not take an oath of office before entering the duties of hearing officer as provided by AS 39.05.130.

Hearing officers are appointed pursuant to AS 44.62.350. Larson v. State, 564 P.2d 365 (Alaska 1977) has provided a comprehensive definition of what public office is. Without discussing the characteristics individually, I find that hearing officer Holmes is indeed a public officer required to take an oath of office. He did not do so in this case; however, his failure to take an oath does not destroy his ability to act as a

properly-appointed hearing officer.

QUALIFICATIONS OF THE HEARING OFFICER

Dr. Smith argues that hearing officer Holmes was not qualified within the meaning of the statute to hear the case. AS 44.62.350(a) and (c), only requires that the hearing officer be experienced in the general practice of law and admitted to the practice of law for at least two years immediately before his appointment. Dr. Smith insists that there is an additional requirement that the hearing officer be a dentist or at least be well-versed in the field of dentistry. Such an interpretation is not supported by the statute. In addition, AS 44.62.450 (a) and (b) gives the Board discretion to delegate all its powers to a hearing officer conducting the hearing

alone. There is no question that hearing officer Holmes had the power and the qualifications to act on the license of Dr. Smith.

BOARD MEETING--REASONABLE NOTICE.

AS 44.62.310, relates to agency meetings open to the public, and the requirement of notice to be given to the public. Initially, Dr. Smith contends that the Board failed to give any notice of the August 18, 1978 meeting. This was the meeting at which the fate of Dr. Smith was decided.

However, Dr. Smith later admits that public notice was given but claims the notice given was not adequate. AS 44.62.310(e) states: "Reasonable public notice shall be given for all meetings required to be open under this section." On August 14, 1978 notice was published

in the Anchorage Times to the effect that the Dental Board was holding a meeting, including the time and place of the meeting. I conclude that this is reasonable notice and is sufficient to satisfy AS 44.62.310.

DECISION OF THE BOARD - MAJORITY OF SIGNATURES

AS 08.36.320 provides: "Order of Reprimand, Suspension and Revocation. The Board may, by majority vote, evidenced by the signatures of the members on the order, reprimand a licensee or revoke or suspend a license." The decision of the Board only bears the signature of the Board's president. (R.848) Dr. Smith argues that becaue it does not bear the signature of the majority of the Board the Order revoking Dr. Smith's license is void.

The minutes of the August 18, 1978 meeting of the board shows (sic) that all board members (Dr. Hansen, Dr. Rick, Dr. Kobylarz, John Beard, Dr. Yuknis, Jana Varrati and Dr. Putman) voted unanimously to adopt the hearing officer's decision. (Appendix D. Appellant's Reply Brief) Hence, I conclude that although the precise wording of the statute was not followed, the decision of all board members was clearly shown. The failure of the order to show all of their signatures does not require reversal of the order.

STATUTE OF LIMITATIONS

Dr. Smith makes the argument that the proceedings before the hearing officer were barred by the statute of limitations. He asserts three statutes of limitations: AS 09.10.120 (six year

limitation for actions bought (sic) in the name of the state); AS 09.10.070 (two year limitation for actions bought (sic) as a penalty of (sic) forfeiture); and AS 12.10.010 (five year limitation for general criminal offenses except murder). Counsel have not cited one single case in which a statute of limitations has been applied to license revocation proceedings of a doctor or dentist. Independent research has also failed to turn up such a case.

On the contrary, the general rule is that proceedings before administrative agencies are not civil or penal actions and statutes of limitations do not apply. Spray v. Board of Medical Examiners, 624 P.2d 125 (Ore. 1981), Bold v. Board of Medical Examiners, 23 P.2d 826 (Cal. 1933), Shea v. Board of Medical

Examiners, 146 Cal. Rptr. 653 (1978), Unnamed Physician v. Commission on Medical Discipline, 400 A.2d 396 (Maryland 1979), Boyle v. Missouri Real Estate Commission, 537 S.W.2d 603 (Missouri 1976), Anne Arundel County Bar Assn, Inc. v. Collins, 325 A.2d 724 (Maryland 1974). Thus, it would appear that none of the statutes of limitations apply to proceedings before the Alaska Board of Dental Examiners.

LACHES

Dr. Smith has also raised the defense of laches. It has been held that the doctrine of laches applies to administrative proceedings, including those revoking a professional license. Pennsylvania State Board v. Schireson, 61 A.2d 343 (Pa. 1948)--(medical license), Ullo v. Commonwealth State Board of Nurse

Examiners, 398 A.2d 764 (Pa. 1979)--(nursing license), Gore v. Board of Medical Quality Assurance, 167 Cal. Rptr. 881 (Cal. 1980)--(medical license). This is consistent with the broad construction given the doctrine of laches in Alaska. Municipality of Anchorage v. Sisters of Providence in Washington, Inc., 628 P.2d 22 (Alaska 1981).

The elements of the doctrine are stated in the case of Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 457 (Alaska 1974):

> The doctrine creates an equitable defense when a party delays asserting a claim for an unconscionable period. A court must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant. Sustaining this defense requires a decision by the trial court that the equities of the case justify refusal to hear and decide a

> party's claim. . . No specific time must lapse before the defense of laches can be raised because the propriety of refusing to hear a claim turns as much upon the gravity of the prejudice suffered by the defendant as the length of the plaintiff's delay.

Thus, there are two independent elements which must be shown before the doctrine can be applied. Smith must show that the State was responsible for inexecusable (sic) delay, and he must also show that the delay resulted in undue prejudice to his defense.

Unreasonable delay has been described as a lack of diligence and neglect for an unreasonable and unexplained length of time under circumstances permitting diligence. Moore v. State, 553 P.2d 8, 16 (Alaska 1976). The State argues that delay between 1968 and 1976 was not unreasonable, as it was occasioned by

confusion over the status of Dr. Smith's license. The State contends that this confusion stems from Judge Lewis' remarks during Dr. Smith's sentencing in 1968.

From the record, I have no doubt that delay in bringing revocation proceedings against Dr. Smith was unreasonable and was the result of lack of diligence on the part of the state. It is clear that Dr. Smith's license was not revoked in 1968, but merely surrendered to the court during the period of his probation.

Thus, it must be determined whether the delay resulted in undue prejudice to Dr. Smith. Material prejudice cannot be inferred from the mere lapse of time. Young v. Williams, 583 P.2d 201, 204 (Alaska 1978). The hearing officer found that the delay did prejudice Dr. Smith, and he took steps to minimize this

prejudice.

Since laches is a creature of equity, it must be determined whether the steps taken by the hearing officer were sufficient to mitigate the prejudice to Dr. Smith and provide him a fair hearing.

Dr. Smith claims the passage of time has resulted in loss of evidence and loss of witnesses. The evidence loss includes:

1. Dr. Smith's dental records;
2. South Central Alaska Dental Society minutes of meetings prior to 1969;
3. The district attorney's incomplete files concerning the criminal proceedings against Dr. Smith.
4. Dr. Whaley's insurance claim report and her entire file

regarding Wells;

5. All of investigator Hughes' notes and records;

With regard to witnesses, Dr. Smith claims loss of five witnesses who were his former employees. The loss of these witnesses allegedly denied Dr. Smith an opportunity to impeach the testimony of Staller and Wright, two of his former employees.

In considering the loss of evidence, the loss of Dr. Smith's dental records should be disregarded. Dr. Smith was in control of his own dental records and it was his decision to destroy them.

Because of the passage of time and loss of evidence, the hearing officer disregarded Counts, (sic) III, IV, and XV of the Accusation. They are:

III. Failure to obtain a complete

medical history from the patient or his doctor before administering anesthetics;

IV. failure to check for vital signs before administering the anesthetic;

XV. failure to maintain proper medical and surgical records.

In addition, the hearing officer found "Dr. Smith's recollection, as well as that of Mrs. Scott, another former employee and several patients, is sufficiently clear on the major points as raised by the State. . . . I am especially convinced of this in light of the fact that some of the most damaging testimony to Dr. Smith came from several of the witnesses called by him and about whom the doctor made no claim that the facts as reported were inaccurately

recalled." (R. 828)

Dr. Smith alleges in his brief that the loss of this evidence "completely destroyed his ability to maintain even a semblance of an adequate defense." (Br. 30). This issue of prejudice presents two weaknesses. First Dr. Smith alleges prejudice in the most general terms. He has failed to convince me that a sufficient connection exists between the lost evidence and witnesses and his ability to conduct an adequate defense. Further, the hearing officer acted prudently and disregarded some of the charges against Dr. Smith. In light of these two factors, I would conclude that the doctrine of laches cannot bar the license revocation proceeding against Dr.

Smith.

DUE PROCESS

The parties agree that a license to practice dentistry is both a protected liberty and property interest. McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982), Storrs v. Lutheran Hospitals and Home Society of America, 609 P.2d 24 (Alaska 1980), Hilbers v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980).

In re Hanson, 532 P.2d 303, 305 (Alaska 1975) instructs that the proceedings of an administrative body should be reviewed

> [T]o assure that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the hearing was conducted in such a way that there

> is an opportunity for the court to ascertain whether applicable rules of law and procedure were observed.

With regard to the notice requirement, Dr. Smith argues that his due process rights were violated because the accusation was not sufficiently definite to allow him a fair opportunity to present a defense. After reviewing the Accusation, I find this contention to be without merit. (R. 1-7). The Accusation names the patients on which the alleged malpractice occurred. In addition, the Accusation details acts and omissions allegedly constituting malpractice.

As discussed, a hearing officer was appointed especially to hear this case. The hearing covered a period from May 1977 to January 1978. Dr. Smith was provided adequate notice and an opportunity

to present his case.

CONDUCT OF HEARING

Dr. Smith first argues that laws were applied ex post facto. This stems from the wording of the fifth count of the Accusation which provides that the respondent violated the statute "by committing willful or gross malpractice, or willful or gross neglect in the practice of dentistry." The statute in existence until July 23, 1968 provided that a dental license may be revoked for "willful and gross malpractice." However, the present law, AS 08.36.310(4), provides that grounds for revocation of license includes "willful or gross malpractice." Smith argues that because the accusation uses the term "willful or gross malpractice", the new statute's provisions were applied ex-post (sic) facto to

his case.

The hearing officer's order states: "Dr. Smith properly raised the fact that it is the statute in existence at the time the acts were allegedly committed which must control. This is the one that I will apply in this action." (R. 828). Thus, it is clear that the hearing officer was aware of the difference between the new and old statute and applied the correct standard.

Dr. Smith maintains that hearing officer Holmes committed plain, prejudicial and reversible error in compelling him to testify. AS 44.62.460(c) provides: "if the respondent does not testify in his own behalf he may be called and examined as if under cross examination." During the hearing, Dr. Smith was called as the state's first

witness. He contends this was prejudicial error, as he interprets the rule to mean that in an administrative proceeding, a respondent may not be called to testify for the opposing party, until he has had an opportunity to exercise his right to testify. Because of the order in calling witnesses, Dr. Smith argues that he was compelled to be a witness against himself. This is not a correct interpretation of AS 44.62.460, in view of the facts. Dr. Smith's name did not appear on his own witness list (R. 96-100). On the other hand, Dr. Smith was listed as the state's first witness. (R. 257). Dr. Smith did not object to the state's witness list at that time. Since it did not appear that Smith was going to testify on his own behalf, it was not error for Smith to be called as

the State's opening witness.

Next, Dr. Smith argues that the hearing officer erroneously admitted the testimony of Dr. Whaley, Dr. Maxwell, and Dr. Kelley and committed prejudicial error by refusing to strike the testimony. Drs. Maxwell, Whaley and Kelley all testified at the criminal trial of Dr. Smith. The state sought and succeeded in getting prior testimony of these three witnesses admitted at the revocation hearing.

Dr. Smith makes three arguments with (sic) regarding this evidence. First, he alleges that the use of testimony from the 1968 criminal trial violated his right to confrontation and cross examination. Second he alleges that certain statements were concealed from him, depriving him of the opportunity to cross

examine on these statements. Lastly, Dr. Smith argues that Dr. Kelly's (sic) prior testimony should be excluded because he is still alive and does not satisfy the requirement of unavailability.

The hearing officer found that the prior testimony could be used because the issues were similar and the right to confrontation and cross examination satisfied. He also found that the concealed statements did not affect counsel's ability to cross examine the witnesses effectively, and he found the requirement of unavailability satisfied as Dr. Kelly (sic) was in Beaverton, Oregon, more than 100 miles away at the time of the hearing. The hearing officer's rulings are correct as a matter of evidentiary law.

Finally, respondent Smith contends

that his due process rights were violated because he did not have an opportunity to present his case to the full Board, and the Board unlawfully failed to consider the record or considered prejudicial material not in the record. As discussed, AS 44.62.450(a) and (b) allows the board to delegate its authority to a hearing officer. The statute does not require a separate hearing before the Board. Regarding the second allegation, Dr. Smith does not provide any evidence to support his claim.

I conclude that the conduct of the hearing met with the requirements of due process.

BIAS AND IMPARTIALITY

On January 29, 1972, the Board of Dental Examiners wrote a memo to Dr. Smith's file. The Board unanimously went

on record as not being in favor of issuing a license to him. This is certainly evidence that in 1972 the Board was not impartial as it had prejudged Dr. Smith. (R. 220). However, the entire composition of the dental board had changed from 1972 to 1976 when the revocation proceeding was first initiated.

Pursuant to AS 44.62.450(c), a party can disqualify any member of the board before the taking of evidence at the hearing, by noting why a fair and impartial hearing cannot be accorded. Dr. Smith knew about the memo and about the steps he had to take to remove biased members of the Board (R. 243). By inaction he waived his right to object. See, Storrs v. Lutheran Hospital and Home Society of America, 609 P.2d 24, 28 (Alaska 1980).

Prior to the appointment of the hearing officer, the Board had ex-parte communications with the Director of the Division of Occupational Licensing, assistant attorneys general and an investigator.

AS 44.62.630 provides:

> [H]earing Officers, . . . shall not engage in interviews with, or receive evidence or arguments from, a party directly or indirectly, except upon opportunity for all other parties to be present.

Dr. Smith interprets AS 44.62.630 to exclude any ex parte communication between the investigative agency and the decision making agency. The Supreme Court of Alaska specifically rejected this argument and held that it was not a denial of due process for an agency to perform dual functions. In Re Hanson, 532 P.2d 303, 306 (Alaska 1975); see

also, In Re Cornelius, 520 P.2d 76, 84 (Alaska 1974). Further, the ex parte contact occurred before the hearing officer was appointed, and before the revocation proceedings formally began. I do not find that the hearing officer or the Board was biased on the grounds suggested.

Next, Dr. Smith attacks the impartiality of the hearing officer. Hearing Officer Holmes is the corporate secretary and legal advisor to the Board of Governors of the Medical Indemnity Corporation of Alaska (MICA). MICA is a public nonprofit insurance company in the health care field. Dr. Smith alleges that Holmes would lose his employment with MICA in the event he gave more credibility to the testimony of dentists than medical doctors, and Holmes wanted

to keep Smith from practicing dentistry because Smith did not have malpractice insurance. The only evidence Dr. Smith provides is the 1980 MICA 5th Annual Report, which does not support his allegations.

The second alleged conflict of interest revolves around the supposed employer/employee relationship between hearing officer Holmes and a witness. Dr. Helen Whaley's deposition (sic) was allowed into evidence at the revocation hearing. Dr. Whaley is deceased, with a surviving spouse, Dr. Robert Whaley. Dr. Smith alleges that Dr. Robert Whaley sat on the Board of MICA at the time of the hearing. This is incorrect. The affidavit of Venetta Hilderbrand notes that Robert Whaley was first appointed to the Board of MICA on November 17, 1978,

after the final decision to revoke Dr. Smith's license on August 18, 1978. (State's motion to supplement the record, September 13, 1982). Dr. Smith's allegations of bias because of the position of Dr. Robert Whaley is totally unfounded.

CONSTITUTIONAL ISSUES--VAGUENESS AND OVERBREATH (sic)

AS 08.36.310(4) provides grounds for revocation of a dentistry license. It states:

> A license and registration may be revoked, suspended or annulled or the licensee may be reprimanded, censured, or disciplined by the board at the hearing when he . . . (4) commits willful and gross malpractice or willful and gross neglect in the practice of dentistry, (sic)

Dr. Smith correctly contends that the terms "willful, gross, malpractice and neglect" (sic) are not defined by the statute.

In determining whether a statute is unconstitutionally vague, the Supreme Court has stated in Summers v. Anchorage, 589 P.2d 863, 866 (Alaska 1979):

> First, a statute may not be so impercisely drawn and overbroad that it "chill" (sic) the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct prohibited. The final element in an analysis of statutory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of its prohibitions.

First amendment rights are not involved in this appeal. Thus we must consider whether the statute provided adequate notice of the conduct prohibited, and whether the statute is so imprecise as to encourage arbitrary enforcement by allowing undue discretion

to the board.

While the terms "willful and gross malpractice or willful and gross neglect" are broad terms, they are not so vague or ambiguous that they fail to provide fair notice of the minimum standard of competency required, or allow the agency to act in an arbitrary and capricious manner. Very similar language has been defined and interpreted to set an appropriate standard for the revocation of professional licenses. Matter of Kerlin, 376 A.2d 939 (N.J. 1977), DeHart v. State Dept. of Licensing and Regulations Board of Registration in Podiatry, 293 N.W.2d 806 (Mich. 1980). In DeHart the court held that the standard of willful and gross malpractice or willful and gross neglect in the practice of podiatry is specific enough to give

notice of the type of conduct required by a professional in the field, and hence, provides a constitutionally-sufficient standard for revoking a license. Also, language similarly broad has been held constitutionally adequate (sic) Sherman v. Commission of Licensor to Practice the Healing Arts, 407 A.2d 595 (D.C. 1979)--(Willful Misconduct); Strigenz v. Dept. of Regulation and Licensing Dentistry Examining Board, 307 N.W.2d 664 (Wisc. 1981)--(Conduct Unbecoming a Professional Person); State Board of Dental Examiners v. Savelle, 8 P.2d 693 (Colo. 1932)--(Professional incompetence).

In support of the argument that the Board acted in an arbitrary manner and enforced the revocation statute selectively, Dr. Smith cites the case of Donald E. Burk who was charged and con-

victed of arson in May 1981, but has not had his license suspended or revoked. This contention has its problems. Dr. Smith's license is not being revoked for his criminal conviction, but on the separate and independent ground of his malpractice. This is clearly distinguishable from the argument that Dr. Burk's license should be revoked solely on the ground that he was convicted of a crime. Thus, I conclude that the language is not unconstitutionally vague and that it has not been shown to allow for selective and arbitrary enforcement.

SUBSTANTIAL EVIDENCE

The final issue is whether the hearing officer's decision satisfies the "substantial evidence" test. I cannot reweigh the evidence or to chose (sic)

between competing inferences; it is my duty to determine if such relevant evidence exists that a reasonable person might accept it as adequate to support the conclusions reached. Interior Paint Co. v. Rodgers, 522 P.2d 164, (sic) (Alaska 1974).

The hearing was commenced on May 4, 1977 and ended on January 11, 1978. During the course of the hearing, 61 witnesses testified, producing a transcript of almost 6,000 pages. Several boxes of exhibits were submitted.

After considering all of the evidence, the hearing officer filed seventeen pages of findings of fact and conclusions of law. The hearing officer detailed individual findings of fact and found overwhelming evidence of malpractice. There is without doubt substantial

evidence in the record to sustain those findings.

CONCLUSION

The decision of the Board of Dental Examiners is affirmed.

DATED at Anchorage, Alaska this 20 day of April 1983.

/s/ Brian Shortell
BRIAN SHORTELL
SUPERIOR COURT JUDGE

BEFORE THE ALASKA BOARD OF
DENTAL EXAMINERS

In the Matter of the)
Accusation Against)
)
ROBERT WAYNE SMITH,)
D. D. S.)
)
Respondent.) No. _____
_____)

DECISION

The attached proposed decision of the hearing officer is adopted by the Board of Dental Examiners as its decision in the above-entitled matter.

This decision shall become effective on service, 19___.

DATED: 8/18/78

Board of Dental Examiners

By: /s/ Arthur S. Hansen, D.D.S.
President

1 - APPENDIX C

BEFORE THE BOARD OF DENTAL EXAMINERS

ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

In the Matter of the Accusation Against License No. 178; ROBERT WAYNE SMITH, D.D.S.,

Respondent.

Hearing Officer File No. 2429

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

FINDINGS OF FACT

1. Respondent, Dr. Robert Wayne Smith, D.D.S., hereinafter referred to as Dr. Smith, was born at Geneva, Iowa, on August 14, 1917. He graduated from Ohio State University School of Dentistry on June 9, 1950, and was licensed, by examination, in Ohio on August 1, 1950. He currently holds Ohio State Dental License No. 9800. He qualified himself to practice oral surgery by satisfactorily

completing a one year post-graduate course in oral surgery at the University of Pennsylvania Graduate School of Medicine, followed by a one year internship and a one year residency in the specialty of oral surgery at Parkland Memorial Hospital in Dallas, Texas, during 1956-1959, under a program accredited by the American Dental Association and the American Board of Oral Surgery.

2. On July 9, 1959, Dr. Smith was licensed to practice dentistry and oral surgery in the State of Alaska, following his successful completion of the Alaska Dental Examination. He currently holds Alaska Dental License No. 178. Dr. Smith desires to continue his dental practice in Alaska.

3. On June 28, 1976, the Board of Dental Examiners requested the Governor

of the State of Alaska to appoint a qualified unbiased hearing officer pursuant to A.S. 44.62.350 to conduct a hearing under the Administrative Procedure Act on Accusation of April 26, 1976.

4. On July 30, 1976, Governor Jay S. Hammond appointed Anchorage, Alaska, attorney Roger F. Holmes, Esq., as hearing officer under the Administrative Procedure Act.

5. The hearing commenced before Hearing Officer Holmes on May 4, 1977 and was concluded on January 11, 1978. Sixty-one witnesses testified during the course of the hearing, several hundred pages of exhibits were introduced and the transcript of the witnesses testimony run s (sic) to 5,763 pages. The Hearing Officer directed the State to file its

final argument, proposed findings of fact and conclusions of law, and recommended decision on or before March 1, 1978; directed that Dr. Smith file all motions he deemed appropriate and his proposed findings of fact, conclusions of law, and recommended decision on or before May 1, 1978; and the State to file its reply thereto on or before May 20, 1978.

6. The evidence presented by the State on the pending Accusation related solely to Dr. Smith's practice and utilization of general anesthesia from 1960 through July 2, 1968. No evidence was presented of alleged improper conduct on the part of Dr. Smith subsequent to July 2, 1968.

7. In the course of this action the hearing officer requested testimony concerning the activities of Dr. Smith from

January of 1976 through the present. The reason for this testimony was to attempt to determine Dr. Smith's present fitness to practice dentistry. The hearing officer determined that such evidence would be relevant to a determination of what penalty should be recommended should the State substantiate its allegations.

8. The results of a full and complete 1968 investigation of the alleged facts and circumstances presented in the current hearing have been in the possession of the Attorney General of Alaska since July 1968.

9. In 1968 and 1970, the Alaska Dental Practice Act was modified by legislation. As implemented by regulations, the Act makes it unlawful for any dentist, including oral surgeons, to administer general anesthetics without a

special permit to do so.

10. The current laws and regulations of the State of Alaska further prohibit the dentist or oral surgeon performing the operative procedure from also administering the general anesthetic.

11. Dr. Smith does not now possess a permit for the administration of an anesthetic agent or agents for the purpose of inducing general anesthesia and is thus prohibited by law from administering general anesthesia to his patients. Dr. Smith has acknowledged that he does not possess such a permit, and he has stated that he does not seek such a permit. Should Dr. Smith hereafter seek such permit, the determination as to whether such permit shall issue rests with the Board of Dental Examiners under the laws and regulations

then applicable thereto.

12. That Dr. Smith voluntarily surrendered his dental license to the Superior Court in 1968. This license was returned to him by order of the Alaska Superior Court. Since March 25, 1976 through the last date of hearing Dr. Smith practiced dentistry on an intermittent basis.

13. Between 1959 and May 10, 1977 Dr. Smith took no formal continuing dental or oral surgical education courses.

14. Between 1968 and March 10, 1977 Dr. Smith never consulted with another oral surgeon concerning the practice of oral surgery other than on one limited occasion with a local oral surgeon on a private matter.

15. The State has alleged in

paragraph 3 of the accusation that Dr. Smith violated Alaska Statute 08.36.310(2) by having been convicted on August 6, 1968 of crimes involving moral turpitude in State v. Smith, No. 68-94 Cr., Superior Court, Anchorage, Alaska. I have disregarded this portion of the accusation. All of the elements comprising that criminal action plus additional elements are the subject matter of paragraph 5 of the accusation.

16. In paragraph 4 of the accusation the State alleged that the respondent violated 08.36.310(1) by attempting to secure a license through deceit, fraud or willful misrepresentation of a material fact. I find no basis in fact for this allegation.

17. In paragraph 5 of the accusation the State alleges that Dr. Smith violated

AS 08.36.310(4) by committing willful and gross malpractice or willful and gross neglect in the practice of dentistry. I find that the State has sustained its burden and find that the respondent did commit willful and gross malpractice and willful and gross neglect.

A. The respondent improperly administered a general anesthetic which contributed to or caused the deaths of the following persons who were his patients:

1) JENNIFER LEE PETERSEN, died during treatment in respondent's office on December 12, 1967.

2) ELIZABETH FAITH PHILLIPS, died during treatment in respondent's office on May 15, 1963.

3) TERRY TIMOTHY WELLS, died on May 18, 1961, about four

weeks after treatment in the respondent's office.

4) MARLENE SCHOFIELD, died on July 8, 1961, about three weeks after treatment in the respondent's office.

5) ALAN ZANE LOWMAN, died during treatment in respondent's office on June 5, 1960.

The State sustained its burden with reference to sub-paragraphs 1, 2, 3 and 5.

B. The respondent improperly administered a general anesthetic to the following patients:

NAME OF PATIENT	DATES OF TREATMENT
Cooper, Lavina E. 1635 Brinks Avenue Anchorage, AK	September, 1966
Johnson, Zella I. Ermine and East 11 Anchorage, AK	December, 1964

Wood, James B. 1117 Chugiak Drive Anchorage, AK	Unknown
Rick, Ida Jewell 1065 East Ninth Avenue Anchorage, AK	1965
Ripley, Nancy 3600 Clay Products Road Anchorage, AK	1966
Ripley, Nora 3600 Clay Products Road Anchorage, AK	Unknown
Beavers, Patricia 3406 Lois Drive Anchorage, AK	1965
James, Wanda L. 1218 H Street Anchorage, AK	1960
Schmitt, Francis C. 1955 Lindon Street Riverside, CA	1961
Barr, Leroy E. 2622 Lovejoy Street Anchorage, AK	1963
Tuter, Margaret S. 1337 Virginia Way Anchorage, AK	August, 1967
Seager, Louis T.	1966

Klatt Road Anchorage, AK	
Montague, Paul D. 4312 Cope Street Anchorage, AK	April 1967, December 1967
Burdon, Elsie M. 2828 Aspen Way Anchorage, AK	Unknown
Carl, Edna 1333 East Ninth Avenue Anchorage, AK	1965
Moore, Michael 933 Cathy Place Anchorage, AK	1966
Moore, Patrick 933 Cathy Place Anchorage, AK	1966
Bennett, Henry A. 2020 Dimond Blvd. Anchorage, AK.	August, 1962
Wanbere (sic), Despo M. 1530 Gampbell(sic) Street Anchorage, AK	December, 1966
Hansen, Stanley 616 K Street Anchorage, AK	1963
Jarrett, Edith H. 1310 Eide Street	June 1962

Anchorage, AK

Birkeland, Mary M. 607 - 42 Street Anchorage, AK	1960, 1962
Goodwin, Gloria Sunset Hills Anchorage, AK	1962, or 1963, 1967
Goodwin, Betty G. Sunset Hills Anchorage, AK	1965 or 1966
Osburn, Barbara 4403 Spenard Road Anchorage, AK	May, 1967
Hall, Grace 5405 Chena Street Anchorage, AK	November, 1966
Stewart, Catherine S. Star Route A, Box 4054 Anchorage, AK	August, 1967
Agen, Delores D. 1606 Patterson Anchorage, AK	1963
Woods, Questa B. 1117 Chugiak Drive Anchorage, AK	Unknown
Peoples, Pricilla 1567 Columbia Street Anchorage, AK	1961

Fish, Carol M. 1249 Bannister Road Anchorage, AK	July, 1960
Zumwalt Klarice 1320 Nichols Street Anchorage, AK	December, 1967
Price, Ruby	1967
Price, Bonnie	Unknown
Price, Peggy	Unknown
Price, Tommy	Unknown

The State submitted evidence on only a portion of the patients named but sustained its burden as to a substantial number of those patients identified in paragraph B.

C. The respondent failed to comply with some or all of the following requirements in administering a general anesthetic to above listed patients:

1) Advise patients not to

eat before surgery.

2) Advise patient to be accompanied home after surgery by another person.

3) Obtain a complete medical history from the patient or his doctor before administering the anesthetic.

4) Check of vital signs before administration of general anesthetic to the patient.

5) Administer proper premedication prior to general anesthetic.

6) Obtain proper consent from patient for use of general anesthetic.

7) Explain risks of general anesthetic to patient before surgery.

8) Maintain patient under general anesthetic for a longer period than customary for an office setting.

9) Leave patient unattended during and after surgical procedure.

10) Constantly monitor vital signs during period patient was (sic) general anesthetic.

11) Maintain adequate emergency drugs and equipment readily available with sufficient-trained personnel to utilize them properly.

12) Utilize properly trained personnel to assist him.

13) Utilize general anesthetic only with sufficient justification.

14) Properly maintain

dental and anesthetic equipment.

15) Maintain proper medical and surgical records.

16) Administer proper emergency treatment when patients developed difficulties with general anesthetic.

17) Administer of (sic) proper amounts of general anesthetic.

The State sustained its burden in numbers 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 16 and 17. It appears that the State presented the more compelling testimony with regard to sub-paragraphs 3, 4 and 15. However, because of the long delay between the time Dr. Smith ceased practice and the time the State sought this hearing I find the prejudice to Dr. Smith in defending these three elements to be sufficient that I did not consider the

violations alleged in sub-paragraphs 3, 4 and 15.

D. During the period above indicated, the respondent administered general anesthetic to the above patients without having received proper training in the administration of such general anesthetic, when he had knowledge, or should in the exercise of reasonable care, have had knowledge, that such a procedure was dangerous without proper education and training.

The State did not sustain its burden.

E. During the period above indicated, the respondent administered general anesthetic to the above patients and on occasion permitted an untrained assistant to monitor the patient's status, which

practice the respondent knew, or should in the exercise of reasonable care have known, was dangerous.

The State sustained its burden.

F. Despite the similarities in the deaths of the individuals listed in paragraph A above, the respondent sought no advice or consultation from his professional peers, although the occurrence of such deaths under similar circumstances and in such frequency would be highly unusual to any dental practitioner.

The State sustained its burden.

G. Respondent, during all of the period since he received his license in the State of Alaska, has neglected to maintain a minimum standard of continuing professional education.

The State sustained its burden.

H. Respondent's conduct as set forth above evidences gross lack of comprehension of the professional obligation borne by a person licensed to practice dentistry in the State of Alaska.

The State sustained its burden.

I. Respondent has not practiced dentistry for the last eight years.

The respondent has taken some continuing education courses commencing in the summer of 1977 and has practiced dentistry intermittently since March of 1976.

18. Not only did the State sustain its burden on those items in paragraph 5 of the Accusation which I set forth above, but the evidence was over-

whelming. In most instances I was shocked by the testimony. Four patients died shortly after receiving general anesthesia administered by the respondent. At pages 73-75 of Volume 6 of the transcript Dr. Smith himself ackowledged that at least three of those deaths involved a cardiac arrest which was related directly or indirectly to the administration of general anethesia (sic). I could find no occasion after each of the four cardiac arrests where Dr. Smith ever made any material changes in his practice or sought guidance concerning any changes he might have made even though he acknowledged that four cardiac arrests was an exceptionally high number. In fact, the State proved beyond a reasonable doubt that Dr. Smith continued to practice the day after the

fourth death with no changes in his office procedure.

19. Dr. Smith frequently used general anesthesia indiscriminately for routine dental work as well as for oral surgery for his convenience or for that of the patient without apparent regard for the extremely high risks involved to the patient. He used general anethesia (sic) on patients in a dental office routinely for long periods substantially in excess of the minimum standards established through the expert testimony. He used it on patients which were extremely high risk. He used it on occasions without properly determining whether the patients had eaten or drunk before the procedure.

20. The respondent did not inform the patients of the high risks involved

in the use of general anesthetic but rather administered it for the convenience of the patient if he asked. (This may have been done to keep patients from suffering from anxiety.) However, having not explained the risks to the patient before surgery no proper consent to the treatment was obtained from the patient.

21. On more than one occasion Dr. Smith left the patient unattended while under general anesthesia during a surgical procedure and while the patient was attached to the anestheic (sic) machine. In fact, the last death which occurred in Dr. Smith's office involved complications which arose shortly after Dr. Smith had left the operatory with his nurse to work on another patient whom he had administered general anesthesia at the same

time. Dr. Smith at that time had left the first patient in the operatory under general anesthesia to be observed by an untrained clerical employee.

23.(sic) On many occasions Dr. Smith performed the surgical procedure, administered the anesthesia and monitored the patient. Dr. Smith operated throughout the majority of his practice without sufficiently trained medical personnel necessary to constantly monitor the vital signs of the patient while under a general anesthetic.

24. The staff he did have had little or no training in emergency situations. Dr. Smith himself was inadequately trained in the use of emergency drugs and procedures and certain of the deaths could have been prevented had he and his staff been well trained in these

emergency procedures. Having had at least three deaths occur shortly after the administration of general anesthetic in an office setting there was no excuse for the lack of training which existed in Dr. Smith's staff at the time of the fourth death. In fact, Dr. Smith reopened the office shortly after that fourth death still with no further emergency training for himself or his staff.

25. Dr. Smith's staff was not sufficiently trained to be of any benefit to him in an emergency situation.

26. Dr. Smith failed to monitor his pateints (sic) who were recovering after the administration of general anesthesia. On several occasions Dr. Smith allowed these patients to drive home unaccompanied by any other person and in a

condition in which they could have caused substantial harm to themselves or others.

27. Dr. Smith routinely used general anesthetic without sufficient justification when a local anesthetic agent could have been utilized. Although there is evidence that dental restorations are done in an office setting under general anesthesia for long periods of time, Dr. Smith subjected his patients to such procedures without sufficiently trained staff to enable him to engage in the procedure safely. Although it would have been difficult to check patients into the hospital for those long procedures in which general anesthesia was necessary, at least one dentist who testified in the hearing was doing so during the period Dr. Smith was practicing. The fact that Dr. Smith would have to have had a

medical doctor admit the patient and that the procedure would have been more difficult to do in the hospital did not justify subjecting the patient to the extremely high risks inherent in the office practice that Dr. Smith conducted. This is especially true in that Dr. Smith did not advise the patients of this high risk.

28. Dr. Smith was administering an extremely potent anesthetic agent at levels higher than were necessary for the procedures utilized by him. Other anesthetic agents less potent could have been utilized.

29. Although most dentists and oral surgeons did not have a defibrillator or an EKG machine in their office during the 60's this was standard equipment in hospital operating rooms. Dr. Smith was

performing operations utilizing a plane of anesthesia and a duration of anesthesia equivalent to that used in hospital settings and he should have had the equipment, and knowledge to use the equipment, at least as great as that of the anesthesiologists and general surgeons located at Providence Hospital during the 60's. This is especially true in light of the fact that during the early 60's Dr. Smith administered general anesthesia at Providence Hospital.

30. The actions described in paragraphs 17 through 29 fall below the minimum standards for the practice of anesthesiology and oral surgery between 1959 and 1968 in Anchorage and similar communities.

31. The respondent failed to exercise the degree of care ordinarily

exercised by anesthesiologists and oral surgeons practicing these specialties in Anchorage and in similar communities to Anchorage and this failure to exercise this degree of care resulted in the deaths of several of Dr. Smith's patients and the extremely high risk of injury or death to numerous other patients. In reaching this conclusion I find that Dr. Stevens and Dr. Frazier established conclusively that the actions of Dr. Smith described herein violated the minimum standards existing in Anchorage. I further find that Dr. Smith, Dr. Stevens, Dr. Frazier, Dr. Kelly and Dr. Funk all established that there were certain minimum standards for the practice of anesthesiology and oral surgery existing in the United States that a violation of these minimum

standards would result in a finding of a lack of care in any community in the United States and especially in the Anchorage community and that Dr. Smith violated these minimum standards.

32. At least on one occasion within the last year Dr. Smith has practiced on a weekend with no assistants to aid him. At that time, he was practicing in the office of another dentist and had no knowledge of where the emergency drug tray was located or even what emergency drugs or equipment were available in the office.

33. Although Dr. Smith cannot use general anesthetic at the present time and professes not to want to use general anesthetic at this time, there are other drug agents that are routinely administered by dentists and oral surgeons in

this community which do not require a specialty license. The administration of any of those agents could possibly be dangerous and require an emergency response. The use of each requires judgment.

34. Dr. Smith asked at least one dental expert from Sweden and two dental professors from the Lower 48 (including one from Baylor University) to review his practice. Further, Dr. Smith himself called Dr. Funk, who was a professor of oral surgery at the University of Washington during the 1960's, to establish certain facts. Having called Dr. Funk as his own witness to establish certain factors and having testified that he called two experts from outside universities to review his practice, I find that Dr. Smith has acknowledged that

these minimal factors existed.

35. Dr. Kelly sufficiently established the similarity between his community in Oregon and Anchorage to make his testimony reliable. I further find that he also established that certain minimum standards existed such as to make his testimony admissible.

36. The evidence showed that Dr. Smith had full knowledge of the hazards he was creating by his actions, or had knowledge of facts which would disclose these hazards to any reasonable man, such as to evidence a reckless disregard of the possible consequences and an indifference to the rights of others. The facts would lead a reasonable man to realize that the doctor's conduct under the circumstances not only created an unreasonable risk of harm to his patients

but also involved a high degree of probability that such harm would result.

37. Dr. Smith's actions showed a willfulness and conscious choice of the course of action, either with the knowledge of the serious danger of injury or death to his patients or with the knowledge of facts which would disclose this danger to any reasonable man, let alone a trained anesthesiologist and oral surgeon.

38. The nature of Dr. Smith's practice was conducted in such a way that any reasonable man would have realized the high probability of injury or death occurring to one of his patients. To make no material changes after any of the cardiac arrests suffered by his patients was willful, reckless and shocking.

39. The respondent committed willful

and gross malpractice and he committed willful and gross negligence in the practice of dentistry. The respondent had or should have had knowledge and understanding of the terms malpractice and neglect as the same are defined in Webster's dictionary. Webster defines neglect as the lack of sufficient or proper care or to fail to care for or attend to sufficiently or properly. Malpractice is defined as the misconduct or improper practice in any professional or official position or injurious or unprofessional treatment or official position or injurious or unprofessional treatment or culpable neglect of the patient by a physician or surgeon.

40. Continuing education courses were conducted as close as Seattle during the 60's which would have been available

to Dr. Smith for him to use in upgrading his training and practices. There was an oral surgeon available at all times at Elmendorf Air Force Base with whom the doctor could have consulted about his problems. The doctor was using the same anesthetic agent (halothane) that the anesthesiologists at time (sic) local hospital were utilizing and these medical doctors would have been available for consultation with the respondent. I find no excuse for his failure between 1959 and 1968 to ever make use of such available resources.

41. The respondent in each instance presented during the 17 weeks of hearing refused any of the blame for any of the deaths and asserted that none of the State's charges were true. This defense is directly contrary to the more credible

testimony (especially that presented by him) and shows a complete lack of willingness to accept responsibility for his actions and to try and insure that they do not occur in the future.

42. Dr. Smith's actions rather than having been motivated by bad character seem to have evidenced a total lack of understanding of the risks involved and a complete lack of judgment on his part necessary to properly protect his patients. Because of the actions which have occurred since he has resumed the practice, I can only conclude that this lack of judgment still exists.

43. I find that this lack of judgment on Dr. Smith's part still exists at the present time. He returned to practice after an eight year layoff without undertaking any general con-

tinuing education courses or without discussing the practicing of oral surgery with any other oral surgeon in town. Further, he began practice without any additional emergency training. It was only after he was questioned about this at the hearing in May of 1977 that he undertook some education courses and some cardio pulminary resuscitation courses.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above I find that the respondent's actions constituted willful and gross malpractice and willful and gross neglect in the practice of dentistry and that the same was a violation of AS 08.36.310(4) as it existed at the time of the actions which were the subject matter of this hearing.

DISCUSSION

It is difficult to recommend a course of action which will deprive a person of his right to make a livelihood in a profession selected by him. It was the administration of general anesthesia which caused or contributed to the problems which have been the subject matter of this hearing. Dr. Smith can no longer administer general anesthesia without a permit.

On the other hand, the problems did not arise in my opinion because of the administration of general anesthesia, but because of a lack of judgment. To allow Dr. Smith to continue the practice of dentistry would be to allow him access to the administration of other potent agents which do carry a certain risk of harm to the patient. After recommencing practice, Dr. Smith on at least one

occasion practiced alone in an office where he had no knowledge of the existence of emergency drugs or equipment. The inescapable conclusion to me is that even without the ability to administer general anesthesia, Dr. Smith has the capability within the practice of general dentistry to inflict injury upon his patients. The fact that he cannot and will not administer general anesthesia without a permit does not, in my opinion, make him an adequate candidate to practice dentistry at this time.

In addition, there is one other reason for the recommendation I am about to make. Dr. Smith is from all appearances a deeply religious man, concerned with his fellow human beings. However, it is my personal feeling that if the

members of the consuming public had been present to listen to the 5,763 pages of testimony they would have been shocked and outraged at the course of conduct which was described. It is my opinion that it would be wrong to allow Dr. Smith to return to the practice of dentistry no matter what restrictions were placed upon him after such a course of practice as was evidenced by the testimony in this hearing. To simply reprimand him at this point would, in my opinion, seriously undermine the confidence of the consuming public in the protection afforded them by the licensing process. The allegations of the State, which I found sustained by the evidence, are so serious and so numerous that they, in my opinion, warrant a permanent revocation of the respondent's license.

RECOMMENDED DECISION

I recommend that the respondent's license to practice dentistry in the State of Alaska be permanently revoked.

DATED this 15 day of August, 1978.

/s/ Roger F. Holmes
ROGER F. HOLMES,
Hearing Officer

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No. 84-183

In The

Supreme Court of the United States

October Term, 1984

ROBERT WAYNE SMITH, D.D.S.,

Petitioner,

vs.

ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF OCCUPATIONAL LICENSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT STATE OF ALASKA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the State Deprive Petitioner of his Right to Due Process When it Initiated License Revocation Proceedings Eight or More Years After Events Which Formed the Basis of the Revocation Proceeding?

2. Does the Inclusion of Police Reports (Which Were Never Introduced into Evidence, Nor in Any Way Made Part of the License Revocation Proceedings,) Into a Consolidated File Deprive Petitioner of His Right to Due Process, Absent a Showing That These Reports Were Reviewed by Any Decisionmaker?

3. When a Contested License Revocation Proceeding is Heard by a Hearing Officer Alone, Does the Due Process Clause Require the Board of Dental Examiners to Afford the Licensed Dentist an Opportunity to Review and Present Argument Before the Board on the Hearing Officer's Proposed Decision Recommending Permanent Revocation?

4. Did the Alaska Supreme Court Err in Concluding Petitioner's Right to Due Process was Not Violated When, At Two Stages in the License Revocation Proceeding, Ex Parte Contacts Were Made Between the Board and the State's Investigator and Attorneys?

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OPINION BELOW

The Alaska Supreme Court decision and judgment that is the subject of the petitioner's petition for writ of certiorari is Memorandum Opinion and Judgment No. 163, dated May 2, 1984. This unreported case is set forth in full in Appendix A to petitioner's petition.

STATEMENT OF THE CASE

On July 9, 1959, following his successful completion of the Alaska dental examination, petitioner was licensed to practice dentistry and oral surgery in the State of Alaska. Between 1959 and 1968 he practiced dentistry and oral surgery in Anchorage.

The petitioner's lack of professional judgment caused the deaths of four patients. In at least three of those instances, the dental procedure involved was fillings. *See State v. Smith,* 593 P.2d 625, 631-32, n. 2 (Alaska 1979) (Boochever, C.J., dissenting). These acts of malpractice led to the petitioner's conviction on two counts of assault and battery in 1968 and, ultimately, to the revocation of his license ten years later. The petitioner's acts of malpractice are detailed in the Board of Dental Examiners' decision, paragraphs 17-37. (R. 834-844).

As a result of the criminal conviction in 1968, petitioner was required to "surrender" his license. It was at the time of sentencing that an unfortunate, and ultimately costly, misunderstanding arose: was the surrender of the license merely for the period of probation (five years) or forever, with the right of reapplication after the term of probation had been completed? The genesis for this dispute arose in the following exchange:

> THE COURT: Execution of the sentence is suspended and you are placed on probation for a period of five years on condition that you surrender to the District Attorney's Office your license to practice dentistry in the State of Alaska and that you do not during that period of probation apply for reinstatement of your license. . .

[M.O. pronouncing sentence, p. 10].

Later the state's attorney asked for clarification of the surrender of the license:

> MR. BOYKO: But at the present time the surrender of his license would mean that [Dr. Smith] is not to practice in the state, as a dentist or oral surgeon, unless he's relicensed under appropriate procedures for. . .
>
> THE COURT: Limiting provisions, that's correct.
>
> MR. BOYKO: Thank you.

[M.O. pronouncing sentence, p. 12].

The issue was not resolved until petitioner filed suit in 1975 to compel reinstatement of his license and a superior court decision in March 1976 that Dr. Smith was licensed and entitled to resume his practice of dentistry unless and until that license was revoked by the Board of Dental Examiners (hereinafter "the board").

Within a month, on April 23, 1976, the state initiated a license revocation proceeding before the board. (R. 1-7). After a year of pretrial discovery and attempts by petitioner to enjoin the hearing, it commenced before Hearing Officer Roger F. Holmes on May 4, 1977 and was concluded on January 11, 1978. Sixty-one witnesses testified during the course of the hearing, several hundred pages of exhibits were introduced and the transcript of the witness testimony ran to 5,763 pages.

On August 15, 1978, Hearing Officer Holmes issued his recommended decision: that petitioner's license to practice dentistry in the State of Alaska be permanently revoked. (R. 847). On August 18, 1978, the board adopted the proposed decision, making it effective upon service. (R. 848).

Petitioner filed his notice of appeal from that decision to the superior court on October 12, 1978. (R. 860-61). The superior court rendered its decision affirming the board on April 20, 1983. (R. 2037-59). Appeal to the Alaska Supreme Court was taken on May 20, 1983. That court's opinion and judgment was rendered on May 2, 1984.

Ancillary to the revocation proceeding, but relevant to the questions presented by petitioner, was the issuance of a cease and desist order enjoining petitioner's practice pending the conclusion of the disciplinary proceeding. Although the administrative hearing before Hearing Officer Holmes was originally scheduled to conclude in May 1977, presentation of evidence, appeals to the superior and supreme courts, and conflicting schedules led the hearing officer to order a continuance of the hearing until Fall, 1977.

Allegations of recent malpractice, the lack of evidence that petitioner had received any continuing education in his almost ten-year absence from the profession, and the delay in the administrative hearing combined to impel Commissioner of Commerce and Economic Development H. Phillip Hubbard on June 7, 1976 to issue a cease and desist order under state law directing petitioner not to practice dentistry in the state pending the outcome of the administrative hearing. The order further declared that petitioner had the right to request a hearing within 15 days of receipt of the order in which case a further order would be entered.

On June 23, 1977, petitioner filed a complaint and application for injunctive relief from the interlocutory order to cease and desist and a separate tort suit. In-

junctive relief was denied and the hearing on the cease and desist order was held. The modified cease and desist order, which permitted petitioner to practice subject to certain health and safety conditions, was appealed and was ultimately reported as *State v. Smith,* 593 P.2d 625 (Alaska 1979).

These and other related cases, including the board's decision to revoke, were eventually consolidated at the superior court level and the records merged.

With respect to petitioner's questions presented for review in the instant case, the May 2, 1984 Alaska Supreme Court opinion and judgment made the following rulings:

With respect to petitioner's first question, denial of due process because of delay, the court held:

> Dr. Smith had a due process right to be heard at a meaningful time before his license was permanently revoked. *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 66 (1965). That right was not violated. The 1968 license suspension occurred pursuant to a sentencing agreement which Dr. Smith himself approved. Although the state's delay in acting on Dr. Smith's license after 1973 was arguably unreasonable, that delay did not forever foreclose the possibility of holding a constitutionally sufficient hearing. Dr. Smith did in fact receive a hearing before his license was permanently revoked. Our review of the record persuades us that Dr. Smith was accorded a hearing which comported with due process requirements. The delay therefore did not deprive Dr. Smith of his right to a fair hearing.

(Petition, Appendix A, pp. 4-5).

With respect to petitioner's second question for review, the alleged extra-record material used by the hearing officer, the court ruled:

> [T]he state has adequately explained the presence of the evidence in the manila envelope. Dr. Smith has not rebutted the state's assertion that the evidence is in the record as a result of the consolidation of the various appeals and he has not shown that the board actually reviewed this evidence during the revocation proceedings.

(Petition, Appendix A, pp. 13-14).

With respect to petitioner's third question for review, the failure to permit argument before the board on the proposed decision, the court determined:

> We note that Dr. Smith had no statutory or constitutional right to appear and speak before the Board. AS 44.62.500(b) renders this case dissimilar to those cases requiring service of proposed decisions because a statute or regulation specifically affords a party an opportunity to respond to the decision. *See Alaska Transportation Commission v. Gandia*, 602 P.2d 402 (Alaska 1979); *Consumers Water, Inc. v. Public Utilities Commission of Texas*, 651 S.W.2d 335 (Tex. App. 1983). There is also no due process right to be heard since Dr. Smith had an opportunity to rebut the evidence during the actual hearing. *Alaska Transportation*, 602 P.2d at 406; *Leeds v. Gray*, 242 P.2d 48, 54 (Cal. App. 1952).

(Petition, Appendix A, pp. 10-11).

With respect to petitioner's fourth question for review, *ex parte* contacts, the court declared:

> Dr. Smith alleges that the Board had improper *ex parte* communications with the state on four separate occasions. There is no merit to his claims as to the

> first three instances. James Reeves' meeting with the Board was entirely proper. Under *In re Cornelius,* 520 P.2d 76 (Alaska 1974), he could advise the Board on procedural matters.

(Petition, Appendix A, p. 14).

> Finally, we recognize that the state's handling of the petition for reconsideration was questionable, but in view of the Board's subsequent denial of the petition we hold that any error is in the nature of harmless error. There is no evidence that the Board's denial was influenced by DOL Investigator Long's letter.

(Petition, Appendix A, pp. 15-16).

———o———

SUMMARY OF REASONS FOR DENYING WRIT

The decision of the Alaska Supreme Court that is the subject of this petition for a writ of certiorari is in complete accord with both state and federal law. The second and fourth questions surround determinations of fact which were resolved against petitioner. None of the questions presented for review rises to the level of a substantial federal question.

———o———

REASONS FOR DENYING WRIT

(a) The First Question Presented by the Petitioner is not a Substantial Federal Question

Petitioner first asserts that the Alaska Supreme Court's decision conflicts "with the principles announced" by this Court "as to the timely initiation of license revo-

cation proceedings." The Alaska court held that due process was not offended by the delay between the events which formed the basis of the revocation proceeding and the proceeding itself. Petitioner refers this Court to no federal or state cases reaching a contrary result.

Armstrong v. Manzo, 380 U.S. 545 (1965), involved the failure of a mother and her successor husband to notify the divorced father of the pendency of proceedings to adopt the daughter. This Court held that due process required that the divorced father be given advance notice and an opportunity to be heard. *Barry v. Barchi,* 443 U.S. 55 (1979), involved an interim suspension of a licensed horse-racing trainer whose horse had been drugged before a race. This Court held that New York's general presuspension procedures comported with due process, but that the delay between the suspension and the hearing in this case was constitutionally infirm because the brief suspension period precluded the trainer from putting the state to its proof until he had suffered the full penalty imposed.

Neither of these cases is applicable. Petitioner was afforded notice of the hearing, the specific allegations, and an opportunity to fully meet the allegations. Except for a brief period of suspension—the subject of an independent proceeding—petitioner was not deprived of his license until after the hearing on the merits.

Below, petitioner presented no cases holding that the length of time between the malpractice and the revocation proceeding denied due process. Instead, petitioner merely submitted that laches and the statute of limitations, both state issues, barred the proceedings. With regard

to laches, the Alaska Supreme Court concluded that the hearing officer properly took account of the delay and discounted those allegations which were prejudicially affected by the delay.[1] The Alaska court also determined tha the proceeding to revoke was not barred by any statute of limitations.[2]

In summary, the Alaska Supreme Court's decision conflicts with no federal cases on the question raised. The issue, presented below as laches and statute of limita-

---

[1] With regard to laches, the intermediate appellate court held that the delay had been prejudicial, but that the hearing officer had taken steps to mitigate the impact. Three counts were disregarded by the hearing officer entirely on that basis. The court was further persuaded by hearing officer's finding that

> Dr. Smith's recollection, as well as that of Mrs. Scott, another former employee and several patients, is sufficiently clear on the major points as raised by the State. . . . I am especially convinced of this in light of the fact that some of the most damaging testimony to Dr. Smith came from several of the witnesses called by him and about whom the doctor made no claim that the facts as reported were inaccurately recalled.

(R. 828).

[2] The general rule is that proceedings before administrative agencies are not civil or penal actions and statutes of limitations do not apply. Anne Arundel County Bar Ass'n, Inc. v. Collins, 325 A.2d 724 (Md. 1974), Bold v. Board of Medical Examiners, 23 P.2d 826 (Cal. 1933), Boyle v. Missouri Real Estate Commission, 537 S.W.2d 1603 (Mo. 1976), Hartman v. Board of Chiropractic Examiners, 66 P.2d 705 (Cal. 1937), Latreille v. Michigan State Board of Chiropractic Examiners, 357 Mich. 440, 98 N.W.2d 611 (Mich. 1959), Saxton v. State Board of Education, 29 P.2d 873 (Cal. 1934), Shea v. Board of Medical Examiners, 146 Cal. Rptr. 653 (1978), Sinha v. Ambach, 91 A.D.2d 703, 457 N.Y.S.2d 603 (N.Y. App. 1982), Spray v. Board of Medical Examiners, 624 P.2d 125 (Or. App. 1981), Unnamed Physician v. Commission on Medical Discipline, 400 A.2d 396 (Md. 1979).

tions, is properly reserved for state court determination. It raises no substantial federal question.

(b) The Second Question Presented by the Petitioner is not a Substantial Federal Question

The second question raised by petitioner arises from the inclusion of a manila envelope containing police reports which was apparently contained in one of the boxes in which the agency record was enclosed and forwarded to the clerk of court in May 1982. The police reports were part of the record in the cease and desist order hearing involving petitioner, a case which was consolidated with the revocation proceeding at the superior court level. From this set of circumstances, petitioner seeks to construct the possibility that either the hearing officer or the board reviewed the extra-record materials four years earlier.

Petitioner, despite extensive opportunity for discovery accorded him by the intermediate appellate court, took no steps to demonstrate that the police reports had been reviewed by any decisionmaker. The Alaska Supreme Court noted that petitioner had failed to rebut the state's assertion that the police reports were included as a result of consolidation and had failed to show that the board actually reviewed this evidence during the revocation proceedings.

Petitioner refers this Court to no authority, state or federal, which conflicts with the Alaska Supreme Court's disposition of this issue. It cannot, therefore, be said to be a substantial federal question.

(c) The Third Question Presented by the Petitioner is not a Substantial Federal Question

The third question raised by the petitioner arises out of his claim that he was entitled to make argument to the Board of Dental Examiners before it acted upon the recommended decision of its hearing officer. Petitioner claims that due process requires such an opportunity. The Alaska Supreme Court held otherwise, "since Dr. Smith had an opportunity to rebut the evidence during the actual hearing." (Petition, Appendix A, pp. 10-11).

Petitioner relies upon this court's holding in *Gonzales v. United States,* 348 U.S. 407 (1955), in support of his assertion that the Alaska high court has misapprehended constitutional constraints. This reliance is misplaced. *Gonzales* involved a draft registrant who, having been denied conscientious objector status, was convicted of violating the Universal Military Training and Service Act after refusing to be inducted. The Department of Justice, acting in an adversarial role to the registrant, failed to supply him a copy of its recommendation to the appeal board or to provide him an opportunity to rebut the adverse recommendation before the appeal board took final action. The registrant argued, and this Court agreed, that the failure to provide the recommendation and an opportunity to be heard was contrary to due process of law. In making this ruling, the Court stressed the importance of the right to rebut contentions made by an opposing party. *See Gonzales,* 348 U.S. at 414, n. 5.

The Alaska Supreme Court's decision in no respect contradicts this holding. In this case, the hearing officer, unlike the Department of Justice in *Gonzales,* was not

acting in the role of an adverse party. Rather, the hearing officer was acting as an impartial adjudicator. As such, his recommended decision to the board, issued after hearing evidence and argument by both sides, does not fall within the rule set out in *Gonzales.*

Petitioner does not contend that he was denied an opportunity to be informed of the charges against him by the division of occupational licensing or the evidence upon which those charges were based or the right to fully rebut the evidence and to argue his case before an officer of the board. All these rights were accorded him. What petitioner argues is that he be guaranteed a right to argue his case twice before the same board. Neither *Gonzales* or any other decision of this Court has so held.

The only case noted by petitioner which reaches a holding contrary to that of the Alaska Supreme Court is *Robinson v. Kentucky Health Facilities,* 600 S.W.2d 491 (Ky. App. 1980). Here the state intermediate appellate court purported to rely on *Gonzales, supra,* in concluding that "it is mandatory that an opportunity for the license holder to review the recommendations [of the hearing officer] and file exceptions be granted. . ." 600 S.W.2d 493. This holding goes far beyond *Gonzales* and would, if so extended, require not one, but two hearings at the administrative level. Furthermore, if after having presented one's case to a hearing officer, serving as the trier of fact, a petitioner were accorded the right to argue the facts before the agency itself, the agency would be unable to reach an informed decision on the issues raised in argument without an independent review of the entire record. While such a review may be appropriate in some cases—at the discretion of the agency—a wholesale en-

grafting of such a requirement would cause another slowdown in the adjudicative process at the administrative level, a process intended to be a speedy and more informal alternative to the judiciary's courtroom.

California's courts confronted this issue early on. In *Dami v. Department of Alcoholic Beverage Control,* 1 Cal. Rptr. 213 (Cal. App. 1959), the court commented:

> Appellant's two constitutional arguments are aspects of the same syndrome since the preliminary right of protest as to the proposed decision would call for resort to the record at this point to resolve any conflicts or error. Appellant in substance contends for the right of the accused to protest the content of the proposed decision and the obligation of the agency to consult the record before resolving the issue.
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> * * *
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> Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.

1 Cal. Rptr. at 217.

Other state cases submitted by petitioner are inapposite. *Hodge, M.D. v. Department of Professional Regulation,* 432 So.2d 117 (Kan. App. 1983), involved a disciplinary proceeding before the board of medical examiners. On cross appeal, the state appellate court was asked to hold that the board had erred because it allowed Dr. Hodge to address it before determining his penalty. This the court refused to do, simply finding that the board had discretion to permit argument. However, contrary to petitioner's implication, the court made no determination

that due process required the opportunity to make argument to the board.

Petitioner also refers this Court to *Consumers Water, Inc. v. Public Utility Commission*, 651 S.W.2d 335 (Tex. App. 1983). In that case, the state court reversed an agency decision because it had failed to provide the applicant an opportunity to argue its case before the agency. Petitioner neglects to inform this Court that the basis for the reversal was not due process—it was a failure to comply with a statute which expressly provided for a party who is adversely affected by a proposed decision to file exceptions and present briefs to the officials ultimately rendering the decision.

In short, the Alaska Supreme Court's ruling on this question does not conflict with any federal cases or with any state court of last resort.

(d) The Fourth Question Presented by the Petitioner is not a Substantial Federal Question

Petitioner alleges that he was denied due process because of two *ex parte* contacts between representatives of the state and the board of dental examiners. The first contact involved advice rendered by a state assistant attorney general on a procedural matter, specifically, the board's option to sit and hear the case itself or to delegate the hearing function to a hearing officer sitting alone. The second instance surrounded a letter from a staff member to the board of dental examiners. The board had previously revoked petitioner's license to practice dentistry. The letter accompanied petitioner's request for reconsideration and recommended its rejection as untimely.

The Alaska Supreme Court found no impropriety in the first contact. With respect to the second, it concluded that "the state's handling of the petition for reconsideration was questionable," but held that it was in the nature of harmless error because there was no indication that the board's subsequent denial of the petition was in any way influenced by the *ex parte* contact.

The Alaska court's holding in this case is consistent with its own prior determinations on this point, *In the Matter of Robson,* 575 P.2d 771 (Alaska 1978), *In Re Cornelius,* 520 P.2d 76 (Alaska 1974). These cases stand for the proposition that one may not simultaneously wear the hat of prosecutor and adjudicator on the merits in the same case. At the same time, due process is not offended when the prosecutor renders advice to the adjudicator on purely procedural matters. These decisions are in keeping with this Court's decision in *Withrow v. Larkin,* 421 U.S. 35 (1975). Petitioner refers this Court to no case reaching a contrary conclusion.[3]

CONCLUSION

The petitioner has failed to sustain its burden of establishing that there are special and important reasons why the writ should be granted. None of the questions presented by the petitioner involves a substantial fed-

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[3] See Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980), rejecting a mechanical rule that any ex *parte* contact touching upon a matter before a tribunal acting quasi-judicially renders the tribunal, or its affected members, unable to act in that matter.

eral question. Nor is there any federal case which conflicts with the Alaska Supreme Court's decision in this matter. Moreover, the decision is plainly right and is fully supported by both state and federal law. Therefore, petitioner's request for a writ should be denied.

Respectfully submitted,

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